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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1965

No. 777

THE CORAL GABLES FIRST NATIONAL BANK and PAN AMERICAN BANK OF MIAMI,
Petitioners,

vs.

AMERICAN SURETY COMPANY OF NEW YORK and JOHN C. NICHOLAS, As Trustee,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS, FIFTH CIRCUIT

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SUPREME COURT OF THE UNITED STATES

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No. .....

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vs.

AMERICAN SURETY COMPANY OF NEW YORK and JOHN C. NICHOLAS, As Trustee,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS, FIFTH CIRCUIT

To The Honorable Earl C. Warren, Chief Justice of the Supreme Court of the United States, and the Associate Justices of the Supreme Court of the United States:

The petitioners, THE CORAL GABLES FIRST NATIONAL BANK, a federal banking institution, with its principal place of business in the City of Coral Gables, Dade County, Florida, and PAN AMERICAN BANK OF MIAMI, a banking institution created under the laws of the State of Florida, having its principal place of business in Miami, Dade County, Florida, respectfully pray that a writ of cer-

tiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit, in case No. 21448, rendered on June 30, 1965, petition for rehearing denied September 3, 1965, reported in 349 F. 2d 595. Judgment of the United States Court of Appeals for the Fifth Circuit in the same case was entered on the same day as the opinion, June 30, 1965. The petition for rehearing from the order of June 30, 1965, was timely filed. A copy of the opinion is certified as a part of the Transcript of the Record forwarded simultaneously herewith (Tr. 475). A copy of the said judgment is certified as a part of the same Record (Tr. 491). A copy of the petition for rehearing is certified as a part of the same Record (Tr. 493). A copy of the order denying the petition for rehearing is certified as a part of the Record (Tr. 521).

OPINIONS BELOW

The opinion of the United States Court of Appeals, Fifth Circuit, dated June 30, 1965, is now reported as aforesaid, 349 F. 2d 595, and a copy thereof is not only in the Record as aforesaid, but is reproduced and attached hereto as Appendix A, page A1. The judgment of the United States Court of Appeals for the Fifth Circuit is reproduced and attached hereto as Appendix B, page A13. The petition for rehearing is reproduced and attached hereto as Appendix C, page A15. The order and judgment denying the petition for rehearing is reproduced and attached hereto as Appendix D, page A42. The opinion and judgment of the United States District Court, Southern District of Florida, dated December 20, 1963, which was the subject matter of the opinion and judgment of the United States Court of Appeals, Fifth Circuit, is shown in the Transcript of the Record at pages 411 to 429, and is reproduced and attached hereto as Appendix E, page A44.

JURISDICTION

This petition for certiorari is filed with this Court under the provisions of Title 11, U.S.C., Section 47, and Section 24, of the National Bankruptcy Act, and within the time permitted under Title 28, U.S.C., Section 2101(c).

QUESTIONS PRESENTED

The Coral Gables First National Bank, a United States banking institution, in 1956 in the pursuit of its purposes as a national bank in Coral Gables, Dade County, Florida, made certain loans to Constructors of Florida, Inc., a Florida corporation. Two loans were made in July, 1956, both secured by recorded chattel mortgages valid under the Florida law, said mortgages creating a lien upon certain itemized road machinery and collateral type of equipment. After the recording of these two mortgages in July, 1956, Constructors of Florida, Inc., a general contractor, entered into a contract with the municipality of West Palm Beach, Florida, covering certain sewer installations. That contract was negotiated and entered into in the latter part of August, 1956, and at or about that time Constructors of Florida, Inc., applied for and received a performance bond from American Surety Company of New York. There was no relationship between the transaction involving the two chattel mortgages of July, 1956, and the subsequent entry into the contract and bonding arrangements some thirty days later.

On or about November 14, 1956, The Coral Gables First National Bank entered into a third type of loan with Constructors of Florida, Inc., in the original face amount of approximately $442,000.00. A mortgage was executed by Constructors of Florida, Inc., dated November 14, 1956,

which was secured by a second equipment lien on much of the equipment which had been covered by the first mortgages of July, 1956, and with the addition of some minor pieces of equipment that had not been previously mortgaged. In addition thereto, as the main security, Constructors of Florida, Inc., assigned to The Coral Gables First National Bank the proceeds of the contractual payments from the City of West Palm Beach sewer contract. This mortgage was duly recorded and consent was obtained from the American Surety Company, as well as from the City of West Palm Beach.

The Pan American Bank of Miami, a Florida banking institution, which with The Coral Gables First National Bank was a member of the Federal Reserve System of the United States, took a participation under a separate agreement under the rules and regulations of the Federal Reserve Board and the Comptroller of Currency, as supervisor of national banks, for approximately 55% of the third loan and a slightly higher percentage of the first two chattel mortgages of July, 1956. There was no assignment of any title of the mortgages or liens held by the National Bank. The participation of the State Bank under the separate contract on the November 14, 1956, mortgage was not entered into until several weeks after November 14, 1956. The National Bank had made the initial loans and held title to all three mortgages. In March, 1957, the National Bank, pursuant to the terms of the third mortgage of November 14, 1956, contended that there had been a default in that mortgage and also that there was a default for non-payment of certain installment payments on the July, 1956, mortgages. The American Surety Company took over the control and possession of Constructors of Florida, Inc., on or about March 15, 1957, and the stock of Constructors of Florida, Inc., was assigned to certain designated representatives of the Surety Com-

pany. The November 14, 1956, mortgage and notes were then renegotiated and certain new trust agreements were entered into under which the payments from all three mortgages were paid under the trust agreement to The Coral Gables First National Bank, as trustee, which in turn under the contract was to make distribution on a certain prorata basis of the sums collected from the City of West Palm Beach contract. This was the first instance where the proceeds of the West Palm Beach sewer contract were pledged as additional security for the first two mortgages, as well as for the third mortgage of November 14, 1956. Constructors of Florida, Inc., through its control by the Surety Company, continued on the construction work and certain payments were made through June, 1957. No payments were made by the City of West Palm Beach directly to The Coral Gables First National Bank pursuant to that trust after June, 1957, but the payments were made directly by the City of West Palm Beach to Constructors of Florida, Inc., for use by the Surety Company in the completion of the sewer contract.

In September, 1957, the National Bank instituted a suit in the Circuit Court of Dade County, Florida, to foreclose all three mortgages. The Pan American Bank of Miami had been joined as a co-party plaintiff because of the requirements of the Federal Comptroller's regulations governing the protection of participation interests with a national bank where the loan was in default under Comptroller of Currency Ruling 1135A. There was no claim by the Pan American Bank that it held any title or legal interest in the mortgages, or that it had advanced any moneys to Constructors of Florida, Inc., or had participated in the initial loans. Constructors of Florida, Inc., was made a defendant, along with numerous other defendants, including American Surety Company of New York, the City of West Palm Beach and certain of the individuals

who had been officers of Constructors of Florida, Inc., and who had endorsed or guaranteed the payments. The Circuit Court of Dade County, Florida, was the State Court of general jurisdiction.

The procedure was for the purpose of foreclosing the lien of the National Bank on the equipment, as well as for the purpose of seeking an accounting and impressing a lien or judgment against American Surety Company and/or the City of West Palm Beach on the proceeds of the West Palm Beach sewer contract, the proceeds of which were claimed to have been wrongfully diverted from the National Bank. Application for the appointment of a State Court receiver had been filed but had not been presented to the Circuit Judge for action, because within a very short time after the suit was filed an involuntary petition in Bankruptcy had been filed in the United States District Court, Southern District of Florida, and a federal Bankruptcy receiver had been appointed, to-wit: John Nicholas, who held possession and custody of all of the assets, including the mortgaged equipment. The receiver and Constructors of Florida, Inc., through the receiver, filed an answer in the State Court proceedings contending that the National Bank had exacted usury in the loan of November 14, 1956. There was no claim of usury interposed by anyone with reference to the two chattel mortgage loans of July, 1956.

Upon the filing of the claim for usury in the State Court against the National Bank, the National Bank immediately filed motions to strike or dismiss those portions of the answer which set up usury against the National Bank, because such a procedure for claiming usury against a national bank by way of counterclaim in an equity foreclosure action by a national bank was prohibited by the provisions of the Federal Statutes, Title 12, U.S.C., §§ 85

and 86. It was contended at the outset that the only remedy permitted for a suit by way of claim of usury against a national bank was first of all limited to either a forfeiture of the interest not yet paid, or for double the amount of the interest actually paid, and it was claimed that the State Court first had no jurisdiction to entertain any action by a borrower against a national bank except strictly in the amount of claim permitted under the statute and in procedure which called for a separate action in the nature of debt where only two parties could be involved—one the borrower and the other the national bank.

The claim of the National Bank was based upon the controlling opinion of this Court in the case of *McCollum* v. *Hamilton National Bank,* 303 U.S. 245, 58 S. Ct. 568, 82 L. Ed. 819. The State Court and counsel for the defendants in that case, while admitting that the McCollum case had laid down such a rule in the construction of the Statute, Title 12, U.S.C., §§ 85 and 86, and that those principles of law and the determination of the restrictive jurisdiction, both as to amount and procedure, prohibited such a counterclaim in an equity suit, yet the defendant, Constructors of Florida, Inc., contended that the opinion in the McCollum case (which was issued by this Court in 1938) was based upon facts which arose before the adoption of the Federal Rules of Civil Procedure which authorized compulsory counterclaims, and that the Federal Rules of Civil Procedure established a new doctrine of substantive law rather than mere adjective law, and superseded or by implication amended the exclusive statutory provisions and remedies in Title 12, U.S.C., §§ 85 and 86. It was pointed out to the Circuit Court of Dade County, Florida, that the United States Court of Appeals for the Tenth Circuit, in the case of *John R. Alley & Co.* v. *Federal National Bank of Shawnee, Oklahoma,* a 1942 decision, 124 F. 2d 995, had held that such an amendment had been created by the

adoption of the Federal Rules of Civil Procedure, and while that was the only case of any appellate Court, state or federal, the Circuit Court of Dade County, Florida, applied that doctrine and ruled that the procedure by way of counterclaim in the equity foreclosure action in said Court could be carried on under the provisions of the Florida Rules of Civil Procedure concerning compulsory counterclaims, notwithstanding the strict prohibition as to procedure and jurisdiction of any Court, state or federal, covering both the procedure and the amount of a claim for recovery of usury.

The National Bank continued this same objection as to jurisdiction and power of the Circuit Court of Dade County, Florida, to entertain these counterclaim procedures for usury against a national bank in this manner and form and in this amount throughout every stage of the procedure. This same objection was made not only in the State Court, but it was made in the various appellate Courts of Florida, and in two instances by a petition for certiorari to this Court, which petitions were denied.

The amount of the usury award and the procedure was discussed in certain cases by the State Court in *The Coral Gables First National Bank* v. *Constructors of Florida,* Fla. App. 119 So. 2d 741, certiorari denied 123 So. 2d 349 (S. Ct. Fla.), certiorari denied in this Court, 365 U.S. 811, 81 S. Ct. 690, 5 L. Ed. 2d 691. These cases are mentioned in the opinion by the United States Court of Appeals, Fifth Circuit, in the reported case to which certiorari is sought, on page 596 of the reported opinion. In addition, there were other cases in the State Court which the United States Court of Appeals, Fifth Circuit, did not even mention in its opinion (see opinion of District Court of Appeal of Florida, Third District, 132 So. 2d 806, and denial of certiorari to the Supreme Court of Florida, September 26,

1961, 133 So. 2d 319). A second petition for certiorari was filed in this Court on the 21st day of December, 1961, and certiorari denied March 5, 1962, 369 U.S. 813, 82 S. Ct. 687. In the meantime, in November, 1958, after the Circuit Court of Dade County, Florida, had rendered its decree of July, 1958, upholding a large usury claim in an amount completely excessive of the amounts provided for in the Federal Statutes, 12 U.S.C., §§ 85 and 86, and in which the said State Court had upheld the right to enforce usury by way of counterclaim under the doctrine of the R. H. Alley & Co. case, supra, and while an appeal was pending under supersedeas, Constructors of Florida, Inc., filed a voluntary Chapter X Reorganization proceeding in the United States District Court, Southern District of Florida. That Court took full jurisdiction of all of the physical assets of Constructors of Florida, Inc., including title, possession and custody of the chattel equipment under the mortgages, and proceeded to liquidate the actual tangible personal property by having an open sale in April, 1959. After the sale of those tangible assets in April, 1959, The Coral Gables First National Bank purchased the assets on a credit bid, so that the Circuit Court of Dade County, Florida, had no jurisdiction in any way over those tangible assets. The District Court of Appeal of Florida, Third District, on March 22, 1960, rendered its opinion on the initial appeal from the judgment and decree of July, 1958, and made a substantial reversal of certain of the provisions of the July, 1958, decree. Not satisfied with the decision the Banks then pursued an attempted certiorari proceeding to the Supreme Court of Florida, and when that Court in September, 1960, denied certiorari without taking jurisdiction, a petition was then filed in this Court on December 1, 1960, which was denied in February, 1961, 365 U.S. 811, 81 S. Ct. 690, 5 L. Ed. 2d 691. The supersedeas had been extended so that there was nothing final in the

State Court litigation until after this Court in February, 1961, denied the petition for certiorari. It was contended that the litigation was then back for reconsideration for new proceedings in the State Court, and the Chapter X Reorganization Court was required to take over all pending litigation. Such an application for an injunction was made to the United States District Court, Southern District of Florida, which denied the injunction, but with certain modifications requiring that the proceeds of any judgments for usury in the State Court be forthwith paid over to John Nicholas, as Trustee in the Reorganization proceedings. In April, 1961 (see Tr. p. 201), the Circuit Court of Dade County, Florida, entered a modified decree, and as a part of that amended decree, in paragraph 3, the Circuit Court of Dade County, Florida, found that there were due to The Coral Gables First National Bank, et al., certain sums of principal and interest on the loans of July 25 and July 24, 1956, and then ruled: "but the mortgages allegedly securing said loans are not enforceable as said Banks are not in equity with clean hands." In the very next sentence the Court said: "The Court does not determine whether or not said loans are now in default inasmuch as the United States District Court for the Southern District of Florida, in the proceedings for the reorganization of Constructors of Florida, Inc. has assumed jurisdiction of said claims."

It is true that in other parts of that decree (see Tr. 201) the Circuit Court of Dade County, Florida, in compliance with the ruling of the Appellate Court of Florida, reduced the interest penalties for usury from the sum of several hundred thousand dollars, found in the decree of July, 1958, to about $80,000.00, yet that amount under the provisions of the Federal Statutes could not have amounted to more than twice $11,500.00, which was interest actually paid. The Banks took an immediate appeal, but without

supersedeas, to the Supreme Court of Florida by applying for a writ of certiorari, and also took an appeal to the United States Court of Appeals for the Fifth Circuit, which resulted in the opinion of the Fifth Circuit, 299 F. 2d 736. The amount of something over $400,000.00 in penalties was paid to the Trustee in the Reorganization proceedings, and said funds are still on hand with the Trustee in the said Reorganization proceedings.

The State Court proceedings on appeal, which were ignored by the United States Court of Appeals for the Fifth Circuit in its last opinion, consisted of procedures in the Supreme Court of Florida by certiorari, which was denied, and then by a new petition for certiorari in this Court filed in December, 1961, which was denied by this Court on the 5th day of March, 1962, 82 S. Ct. 687. Facts and opinion referred to Florida Appellate 132 So. 2d 806, Florida Supreme Court 133 So. 2d 319.

After this Court in March, 1962, denied the writ of certiorari, then for the first time proceedings were activated in the United States District Court, Southern District of Florida, in the Chapter X reorganization. Objections to the various claims had been made in 1959 and all parties had agreed that the hearings in the United States District Court on the objections would not be heard or the issues determined until the then pending procedures in the State Appellate Court had been determined. None of the parties, to-wit: the Trustee, the Banks or the Surety Company, in the plan of reorganization ever stipulated or agreed that they would be bound in the Federal Court by the determination of the State Court procedures. The Trustee has made no such contention, and while there is an inference from the last opinion by the United States Court of Appeals for the Fifth Circuit that such was the case, that is not borne out by the Record (see Tr. pp. 91-94). (For a de-

tailed discussion of this point see Petition for Rehearing, pages 18 and 19, App. C, p. A15).

There were many factors in the State Court litigation and several parties involved who were not primarily involved in the reorganization proceedings. The National Bank had persisted in continued objections to the jurisdiction of the Circuit Court of Dade County, Florida in its attempt to entertain a counterclaim for usury in the State Court foreclosure proceedings. That point had been assigned as one of the errors in the lower State Court and had not been disposed of by the Florida Appellate Court. The stipulation of the Banks, as above referred to in the Record, did not contain any consent that it, the National Bank, would accept the jurisdictional determination by the State Court of its claim of jurisdiction in view of the specific language to the contrary in the Federal Usury Statute, 12 U.S.C.A., §§ 85 and 86. The plan itself did not make any such requirement and these rights were all reserved by all parties. This point is one of the fundamental errors which we say was committed by the United States Court of Appeals for the Fifth Circuit in the last opinion.

The Record is clear that after March, 1962, and after all appellate procedure had been concluded, both in the Supreme Court of Florida and in this Court on the application for petition for certiorari, the Trustee and his counsel, John H. Gunn, then set down for argument and disposition the various objections which had been filed by the Trustee to the claims of American Surety Company and the claims of the Banks, and the objections of the Banks to the claims of American Surety Company had also been set down. The Record does not disclose that the Trustee took the position that the Banks had waived any right of further contest because of the impact of the State Court litigation. The issues were referred before the Referee, sitting as Special

Master, in the first instance and then before the District Judge on these issues. The District Judge himself proceeded to determine the issues in the light of the mandate and opinion of the United States Court of Appeals for the Fifth Circuit in the decision in 299 F. 2d 736. These issues were determined after lengthy litigation and the opinion and judgment of the United States District Court, Southern District of Florida, was entered on December 20, 1963, which is referred to in the Record and a copy of which is attached hereto as Appendix E, page A44. The United States District Judge undertook this lengthy trial under the provisions of the opinion of the United States Court of Appeals, Fifth Circuit, 299 F. 2d 736 (see text p. 740), in which that Court in note 16 said:

> "As in note 15, supra, we likewise expressly disavow any purpose here to indicate any view on the extent to which, if any, the State Court judgment is to determine priorities, enforcement of security by the Banks, or other creditors, or the like. Although the Bankruptcy Court refused to enjoin execution on the State Court judgment, the funds received by the Receiver are now, and will remain, subject to the sole control and disposition of the Bankruptcy Court."

It is clear that in April, 1961, when the State Court entered its second decree, it did not have any jurisdiction of any kind over the chattel mortgages of July, 1956, nor of any of the chattels or equipment used as security for any of the three mortgages, with the exception of the claim against American Surety Company and the City of West Palm Beach. In brief, in the order of the District Court since all of these assets had been for a number of years in the Reorganization Court and had been sold and disposed of, there could be no judgment of the Circuit Court of Dade County, Florida, that could control the disposition of the lien of those two July, 1956, mortgages. In our

opinion the District Court properly held that the so-called doctrine of "clean hands" which would prevent the foreclosure of those mortgages in the State Court against certain equipment would not determine any question of ultimate title or lien on the assets and could not in any way bind the District Court of the United States in the Reorganization proceedings. Therefore, as a result of the proceedings in the United States District Court and under the authority granted to it by the Appellate Court in the opinion, 299 F. 2d 736, both the United States Court of Appeals for the Fifth Circuit and the subsequent opinion by the United States District Judge specifically held that there could be no doctrine of res judicata with reference to some $131,000.00 as to the specific liens on the chattels which had always been in the possession of the Bankruptcy Court, either in the involuntary bankruptcy of 1957, or the subsequent Chapter X proceedings which began in 1958.

It was pointed out in the opinion of the United States District Court that the law of Florida, as well as the decisions of various Federal Courts, clearly held that the mere refusal of a State Court to enforce a claim on the doctrine of unclean hands could not act as a forfeiture of the lien claims which were definitely fixed by state law, and it was the duty of the Court to enforce both the claim and the liens of the mortgages in the Bankruptcy Court against the assets in the Bankruptcy Court over which the Bankruptcy Court had had jurisdiction at all times.

The United States District Court also pointed out that since these other decisions of the State Court had been rendered this Court had decided the case of *Southern Construction Company* v. *Pickard*, 371 U.S. 57, 83 S. Ct. 108. This case involved the determination by this Court that where a statute of the Congress, such as the Miller Act, defined and created the rights of contractors or claimants un-

der a Miller Act bond and also specified the exclusive method of remedy and enforcement, that the law was final and exclusive and no Courts under the guise of rules of procedure had the jurisdiction to go beyond and in contradiction of the specific sections on the matter of procedure, venue and jurisdiction. Under the doctrine of this case the original theory of the Tenth Circuit in the Alley case, supra, was completely exploded, so that the question of jurisdiction of the State Court to entertain suits against a national bank for usury by way of counterclaim was definitely held in effect to be improper and without jurisdiction. The District Judge in his opinion also specifically pointed out that this Court in the case of *Mercantile National Bank at Dallas* v. *Langdeau*, 83 S. Ct. 520, 371 U.S. 555, and in the case of *Michigan National Bank* v. *Robinson*, 83 S. Ct. 914, 373 U.S. 591, had revitalized and clarified the provisions of Title 12, U.S.C.A., §§ 85, 86 through 94, and that all of the provisions of these protective statutes pertaining to suits against national banks were still in force and effect and had not been changed by implication. The Mercantile National Bank of Dallas case involved suits against the Republic National Bank of Dallas for fraud claims in the 98th District Court of Travis County, Texas. Notwithstanding the venue provisions of the Texas Regulatory and Procedural Laws, this Court said that these national banks under Federal Statutes specifying the place where proceedings may be had against federal associations could be sued only in the county where the national bank is located, whether the suits are filed in a Federal Court or a State Court. It held that the action in a State Court could not be brought unless that State Court was sitting in the county in which the bank had its principal place of business.

In the Michigan National Bank case above referred to, 372 U.S. 591, there was an actual claim for usury in certain

transactions in Nebraska, and subsequent suits in the District Court of Lancaster County, Nebraska, affirmed by the Nebraska Supreme Court upholding the doctrine that the state law would control as to venue and procedure. In this case on appeal this Court in applying the doctrines of Title 12, U.S.C., § 94, and Title 12, U.S.C., § 86, said that the United States Statutes as to the procedure in usury claims against a national bank had to be strictly applied and were exclusive and controlled over any so-called concept of the state laws.

Therefore, summarizing the questions presented, they may be briefly stated, as follows:

(1) **Under the provisions of Statute 5198, of which 12 U.S.C.A. §§ 85 and 86, are a part, does any court, state or federal, in an action by a national bank to foreclose chattel mortgages have the right, jurisdiction or power to entertain a claim of usury as a counterclaim to that foreclosure action, or must the jurisdiction and power of that court, or any other court, be limited to entertain a suit by the person who has paid usurious interest in an action in the nature of an action of debt?**

(2) **Even in an action in the nature of an action for debt as specifically recognized and authorized under the decision of this court in McCollum v. Hamilton National Bank, 303 U.S. 245, 58 S. Ct. 568, 82 L. Ed. 819, does any court have the power or jurisdiction to impose or grant a judgment against a national bank for usury in excess of twice the amount of the interest actually paid?**

Phrasing this point another way—**Is the decision of this court in the said McCollum case still the law of the United States and has it always been the law of the United States since it was rendered in 1938, so as to make null and void the proceedings in the State Court of Florida in the case at bar?**

(3) Has the national bank in this case been denied the protection of the Fourteenth Amendment of the United States Constitution, in that by certain state processes it has been deprived of its property without due process of law and has been denied by the State Courts of Florida the equal protection of the laws which are guaranteeed to it by the Acts of Congress affecting usury claims against a national bank?

(4) Where a national bank is the owner of certain chattel mortgages on property, which mortgages are included in a state court foreclosure proceeding in conjunction with the foreclosure of a third mortgage which is a junior lien by a subsequent mortgage on most of the same personal equipment covered by the first two mortgages, and within several weeks after the institution of that mortgage foreclosure involving three mortgages a receiver in bankruptcy is appointed and the receiver takes possession of the tangible personal property and then enters the state court litigation and files a counterclaim claiming usury on the third mortgage but not on the first two mortgages, and objection is immediately made by the national bank that under Title 12, U.S.C.A., §§ 85 and 86, any suit for usury penalties against the national bank of an affirmative nature is restricted to a suit in the nature of an action for debt by the borrower against the national bank, in which suit the bank is entitled to a jury trial, and where the extent of the claim is restricted to a claim for double the amount of the usurious interest paid, can any court, state or federal, grant a claim in excess of the amount limited by the Act of Congress on the alleged usurious third mortgage and at the same time enter a forfeiture order against the national bank on the enforcement of its lien for the first two mortgages which are not even in contest, as an additional penalty which would be binding upon a Chapter X or bankruptcy court which at all times had posses-

sion of the assets and which had liquidated the assets by sale during the reorganization proceedings?

(5) **In this circumstance does the State Court have any jurisdiction under the doctrine of unclean hands to pass a judgment which is res judicata upon a reorganization bankruptcy court so as to preclude the district judge of the United States Court in the reorganization proceedings from making an order of distribution in accordance wth the law applicable and cause a forfeiture of some $131,000.00, plus interest, of the liens against the proceeds of the bankruptcy sales?** (Note: All of the money, some $400,000.00, as a result of the executions in the State Court proceeding for usury penalties, as well as $131,000.00 in cash deposited as security for a credit bid under separate procedures in the Federal Court Reorganization proceedings, were at the time not covered by any execution from the State Court proceeding and were and are at this time in the hands of the United States District Court through its Trustee in the Reorganization proceedings and have not been distributed or expended.) **The United States District Judge in the decree and judgment of December 20, 1963, had separately ordered that this fund of $131,000.00, plus interest, in no way involved in the executions or in the state court proceeding, was obtained as the result of the sale of tangible property always in the control of Bankruptcy Court, and that that state court procedure could not and did not determine in any way the validity of the claims of the national bank under the first two mortgages. The opinion of the United States Court of Appeals, Fifth Circuit, now under attack found that the District Judge was wrong and that the doctrine of res judicata would apply and that the mere finding by the State Court that while the liens and the debts evidenced by the first two mortgages were valid they were not enforceable in that state court action because the banks were in equity with unclean hands. Is this**

clearly an erroneous finding by the United States Court of Appeals, Fifth Circuit, and does it create a forfeiture of valuable lien rights against the equipment or its proceeds in contradiction to specific provisions of the Fourteenth Amendment as above set forth?

(6) Where usury is claimed against a national bank in a Florida Circuit Court in ordinary foreclosure on an original mortgage loan of $442,200.00, and where only $11,500.00 was paid by the borrower for interest, does any court, state or federal, under the restrictive terms of Section 5198, also known as 12 U.S.C.A., §§ 85 and 86, have the jurisdiction or power to render a judgment based solely upon the claim of usury, the effect of which is to wipe out the balance of a principal claim of $282,000.00, and to give an affirmative judgment by way of counterclaim back against the national bank and its participant of over a $500,000.00 penalty?

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

(1) Amendment V, Constitution of the United States:

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself; nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

(2) Section 1, Amendment XIV, Constitution of the United States:

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

(3) Section 5198, General Statutes of the United States, Portions of Which Are Involved in This Case, under Title 12, U.S.C.A., §§ 85 and 86:

"§ 85. Rate of interest on loans, discounts and purchases

Any association may take, receive, reserve, and charge on any loan or discount made, or upon any notes, bills of exchange, or other evidences of debt, interest at the rate allowed by the laws of the State, Territory, or District where the bank is located, or at a rate of 1 per centum in excess of the discount rate on ninety-day commercial paper in effect at the Federal reserve bank in the Federal reserve district where the bank is located, whichever may be the greater, and no more, except that where by the laws of any State a different rate is limited for banks organized under State laws, the rate so limited shall be allowed for associations organized or existing in any such State under this chapter. When no rate is fixed by the laws of the State, or Territory, or District, the bank may take, receive, reserve, or charge a rate not exceeding 7 per centum, or 1 per centum in excess of the discount rate on ninety-day commercial paper in effect at the Federal reserve bank in the Federal reserve district where the bank is located, whichever may be the greater, and such interest may be taken in advance, reckoning the days for which the note, bill, or other evidence of debt has to

run. The maximum amount of interest or discount to be charged at a branch of an association located outside of the States of the United States and the District of Columbia shall be at the rate allowed by the laws of the country, territory, dependency, province, dominion, insular possession, or other political subdivision where the branch is located. And the purchase, discount, or sale of a bona fide bill of exchange, payable at another place than the place of such purchase, discount, or sale, at not more than the current rate of exchange for sight drafts in addition to the interest, shall not be considered as taking or receiving a greater rate of interest."

§ 86. Usurious interest; penalty for taking; limitations.

The taking, receiving, reserving, or charging a rate of interest greater than is allowed by the preceding section, when knowingly done, shall be deemed a forfeiture of the entire interest which the note, bill, or other evidence of debt carried with it, or which has been agreed to be paid thereon. In case the greater rate of interest has been paid, the person by whom it has been paid, or his legal representatives, may recover back, in an action in the nature of an action of debt, twice the amount of the interest thus paid from the association taking or receiving the same: *Provided*, That such action is commenced within two years from the time the usurious transaction occurred."

(4) U.S.C.A., Title 12, § 1, which authorizes the creation of the Bureau of the Comptroller of Currency for national banks, and U.S.C.A., Title 12, § 21, authorizing the creation of national banks through the operation of the Comptroller of Currency, which creates a complete system for not only the establishment by the Government of national banks as distinct and separate from any power of State Courts or the laws of the States in interference with the operation and control, except as it may be permitted by Congress (*Deitrick* v. *Greaney*, 309 U.S. 190, 60 S. Ct. 480, 84 L. Ed. 694).

(5) COMPTROLLER OF CURRENCY RULING 1135A:

"1135A. Sale of loan participations to other banks on a 'last in-first out' basis.

The sale of a participation in a loan to another bank (usually the sale of the 'overline' or legally excessive portion of a loan) under an arrangement whereby the placed portion of the debt must first be extinguished subordinates the interest of the selling bank. It is unsound to place the selling bank in a position whereby any loss that may occur on the entire loan up to the amount of the selling bank's participation must be borne by it, and 'overline' participations the intent and purpose of R.S. 5200 would be nullified under an agreement having this effect. To avoid this possibility, participation arrangements giving to one of the participating banks an earlier maturity or preference with respect to payment of the obligation(s) in the regular course of business, should provide that in the event of default (interest and/or principal payments past due and unpaid for such period as the participants may by agreement determine) on the loan, the appointment of a receiver, or bankruptcy of the borrower, the participating banks shall share in all subsequent loan payments and collections in proportion to the percentage of participation held by each bank at the time of the default, the appointment of a receiver, or bankruptcy. With respect to participations in real estate loans see Paragraph 2715."

STATEMENT

In the statement of questions involved and the references to the various opinions we have set forth in detail the steps taken in the Courts of Florida, the timely objections made and the proceedings in the United States District Court, Southern District of Florida, in both the involuntary bankruptcy of Constructors of Florida, Inc., which began in October, 1957, and the subsequent proceedings in the voluntary Chapter X Reorganization proceeding which began in the early part of November, 1958.

As the result of the questioned procedure beginning in the Circuit Court of the Eleventh Judicial Circuit in and for Dade County, Florida, in Chancery, in September, 1957, the National Bank sought only to foreclose a mortgage on chattels. The chief defendant was Constructors of Florida, Inc., a Florida corporation. There was no diversity of citizenship. The chattels were present in Florida. Relief was sought against the City of West Palm Beach, a Florida municipality, and against the American Surety Company of New York, which was authorized to do business in the State of Florida. There were numerous individual defendants who had endorsed or guaranteed the various notes secured by the mortgages. The Chancery Courts, or equity Courts as they are called in Florida, are for the purpose, among other things, of foreclosing certain liens, jurisdiction of which is fixed in the Constitution of Florida and by the statutes. There are no jury trial systems used in Florida in the Chancery or equity side of the Court.

Shortly after the equity foreclosure suit had been started an involuntary petition for bankruptcy had been filed by outside creditors against Constructors of Florida,

Inc., the maker of the mortgage and notes. A receiver in Bankruptcy was appointed pending the question of adjudication. That receiver, together with the Constructors of Florida, Inc., principals, filed an answer in the nature of a counterclaim, claiming an action affirmatively against the National Bank for usury. At that stage of the procedure, as we have heretofore set forth, the National Bank raised the question by motions to strike and dismiss the counterclaims, setting forth §§ 85 and 86, U.S.C., Title 12, in which the question was squarely presented that even though the foreclosure could continue in the State Court against the chattels, Constructors of Florida, Inc., had no right to raise the question of affirmative usury in that proceeding; that it was relegated to a separate suit in the nature of an action for debt where the only issues to be involved would be a claim by Constructors of Florida, Inc., or its receiver, on the one hand, as plaintiff, and the National Bank as defendant. A jury trial was allowed and was mandatory in such a case under the Florida law which has maintained a separation between equity and law actions. Even where only the cause of action is maintained under the Federal Rules of Civil Procedure, yet where the issue is one that was triable in a law action with a jury, before the adoption of the rules the right to a trial by a jury was preserved (see *Black, Trustee* v. *Boyd*, U.S.C.A. 6, 1957, 248 F. 2d 156. See also *Beacon Theaters, Inc.* v. *Westover*, 359 U.S. 500, 79 S. Ct. 948).

The question was also raised that since there was only an actual payment of interest on the mortgage of November 14, 1956, of $11,500.00, the total claims under Title 12, U.S.C.A., § 86, would be limited to a claim of double that amount. It was pointed out that the relief sought, which called for forfeiture of principal and excessive interest repayments and other penalties under the Florida statutes, was not applicable and that the Circuit Court of Dade

County, Florida, while having jurisdiction for the foreclosure of the lien of the mortgages did not have any right or jurisdiction in the face of the federal statutes to entertain such an action. Notwithstanding this plain objection the Circuit Court of Dade County, Florida, proceeded, which ultimately resulted in a usury penalty exaction wiping out the principal of the National Bank's claim and exacting affirmative damages in excess of $400,000.00. That Court also attempted to hold that certain mortgages which were not involved in the usury feature could not be enforced in the equity Court of the State of Florida because the Bank was in equity with unclean hands.

As we have heretofore pointed out, all of the tangible personal property had been seized by the Bankruptcy Court under its receiver and that property was never under the control or legal custody of the Circuit Court of Dade County, Florida.

In the fall of 1958, there was a voluntary petition for reorganization filed by Constructors of Florida, Inc. The technical difference that was brought about by the approval of the Chapter X Reorganization petition was that the trustee in Chapter X was then vested not only with possession and custody, but full title to all of the assets of Constructors of Florida, Inc. Claims were filed by the National Bank in the Chapter X proceedings and a tentative allowance in the amount of approximately $282,000.00 on its three mortgages was entered.

The State Court litigation had resulted in a decree in the Circuit Court of Dade County, Florida, on June 26, 1958, amended on July 2, 1958, and a complete and full supersedeas bond had been filed pursuant to an appeal from that decree to the District Court of Appeal of Florida, Third District. That Court, the appellate Court, did not make any ruling until March, 1960, when there was a decree par-

tially in affirmance and partially in reversal on certain points. Prior thereto, in April, 1959, the United States District Court, sitting as a Reorganization Court, ordered a sale of all of the tangible property. This property was sold and the proceeds of that sale were held under the supervision of the United States District Court in the name of the trustee for the entry of proper orders of distribution.

After the decree based upon the mandate of the Florida Appellate Court was entered in April, 1960, the matter was again appealed, but as a result of the judgment of April, 1960, no supersedeas was granted and the trustee in Bankruptcy was paid new money in the sum of approximately $400,000.00, which was then taken over by the trustee in the Chapter X proceedings and that fund, together with the proceeds of the original sale in 1959, in the original amount of $106,000.00, plus interest, is still held in the trustee's account under the supervision of the United States District Court in the reorganization proceedings. Other features of the background of the litigation have been discussed by the United States Court of Appeals for the Fifth Circuit in its opinion, 299 F. 2d 736, and later in the opinion of the United States District Judge, dated December 20, 1963, a copy of which is attached to this petition as Appendix E, page A44. Other features were discussed in the opinion, the review of which is now sought, by the United States Court of Appeals for the Fifth Circuit, 349 F. 2d 595.

As the result of the last opinion by the United States Court of Appeals for the Fifth Circuit these penalties exacted by the State Court have been upheld without any retrial of the issues in the Federal Court insofar as the distribution of money is concerned. There has never been any trial in any action brought by Constructors of Florida, Inc., the debtor, or the trustee, pursuant to the pro-

visions of Title 12, U.S.C.A., §§ 85 and 86. The provisions of the mandatory law of the United States through the Acts of Congress have been ignored. The actual errors in the opinion of the United States Court of Appeals, Fifth Circuit, have been specifically pointed out in the petition for rehearing, which for the sake of brevity we refer to, a copy of which opinion is attached hereto as Appendix C, page A15.

REASONS FOR GRANTING THE WRIT

I.

The Courts of Florida, as well as the United States District Court, Southern District of Florida, and the United States Court of Appeals for the Fifth Circuit, have failed or refused to give any consideration of or weight to the mandatory and exclusive provisions of Title 12, U.S.C.A., §§ 85 and 86, in the allowance of certain exorbitant claims in the nature of penalties and forfeitures against a national bank.

II.

The United States Court of Appeals for the Fifth Circuit in its opinion, 349 F. 2d 595, has rendered an opinion which is in conflict with the decisions of this Court in the cases of *McCollum* v. *Hamilton National Bank*, 303 U.S. 245, 58 S. Ct. 568, 82 L. Ed. 819; *Mercantile National Bank at Dallas* v. *Langdeau*, 371 U.S. 555, 83 S. Ct. 521; *Michigan National Bank* v. *Robinson*, 372 U.S. 511, 83 S. Ct. 914; *Republic National Bank of Dallas* v. *Langdeau*, 371 U.S. 555, 83 S. Ct. 521; *Southern Construction Company* v. *Pickard*, 371 U.S. 57, 83 S. Ct. 108. The opinion of the United States Court of Appeals for the Fifth Circuit is also in conflict with the opinion of the United States Court

of Appeals for the Sixth Circuit in the case of *Schumacher v. Lawrence*, 108 F. 2d 576. The controlling subject matter of the federal opinion, beginning with the McCollum case and the Schumacher case, is as follows, and we quote from page 570 of the McCollum case, 58 S. Ct. 568, where this Court said:

> "One paying a national bank usurious interest and entitled to enforce the penalty may not recover it by way of set-off in a suit brought upon his note to the bank."

III.

When a Chapter X Reorganization Court has obtained moneys through the process of a State Court, which said Court was acting under a procedure prohibited by the federal law in an action against a national bank and now holds over $500,000.00 of funds received from the national bank by way of usury penalties, is that Chapter X Reorganization Court to be permitted to disburse those moneys which are claimed to have been wrongfully extracted and, therefore, wrongfully held by the trustee when the said United States District Court has not of itself determined the equitable issues? We respectfully say that this Court should grant this writ so as to determine whether a Federal Court sitting in reorganization proceedings is entitled to make disbursements of money which it has received in contravention of and in non-compliance with the federal requirements, to the end that it is aiding and abetting in the disbursement of funds which have been collected by other sources without due process of law and without equal protection of the law.

ARGUMENT

We are not seeking at this stage of the procedure to have this Court on this petition for certiorari examine the records in all of these cases and to try de novo the amount of usury penalties, if any, that should have been extracted or exacted from the National Bank. That is a matter that no Court having competent jurisdiction, in our opinion, has ever passed upon in the type of procedure or suit exclusively authorized by the federal law. If the federal decisions—particularly the decisions of this Court in the McCollum case, supra, and other cases—can be ignored, then what is the use of having a separate federal banking system? What is the use of having rules and regulations by the Comptroller of Currency, and what is the use of having statutory enactments by the Congress? In suits against a national bank for usury, if the Congress many years ago saw fit to set up restrictive provisions to prevent such a condition as resulted in this case, then where is the protection today which Congress intended at the inception of the creation of the Federal Banking System?

In the opinion of the United States Court of Appeals for the Fifth Circuit, 349 F. 2d 595, we have pointed out in the petition for rehearing to that Court the many errors which we contend were committed by the Court, as well as many features of that opinion which do not clearly disclose the actual record and wherein the opinion is based upon erroneous conclusions of fact as shown in the Record. The doctrine of res judicata as so sweepingly invoked by the United States Court of Appeals, Fifth Circuit, is not based upon any real determination of issues determined by a companion or collateral State Court where that Court had jurisdiction over the subject matter.

An interesting and, we think, applicable case in theory is a decision by this Court of *Granville-Smith* v. *Granville-Smith*, 349 U.S. 1, 75 S. Ct. 553. This case was a review of two decisions by the United States Court of Appeals for the Third Circuit—the first one the case of *Alton* v. *Alton*, 207 F. 2d 667—and the original Granville-Smith case in the United States Court of Appeals for the Third Circuit, 214 F. 2d 820. These decisions involved the jurisdiction of certain District and Territorial Courts set up under the Act of Congress for the Virgin Islands, Division of St. Thomas and St. John. Divorces had been granted by that District Court in hundreds of instances based upon the actions of the Territorial Assembly which had provided that a mere six weeks residence in that territory qualified a plaintiff to bring an action for divorce.

In the Alton case Sonia Alton, a resident of West Hartford, Connecticut, went to the Virgin Islands, where she arrived February 10, 1953. After six weeks and one day of continuous presence there she filed a suit for divorce on March 25, 1953. Her husband, David Alton, the defendant, entered an appearance and waived service. The case was referred to a Commissioner, who recommended that the plaintiff be granted a divorce. When the cause came on to be heard before the judge of the District Court, that judge questioned the evidence as to domicile. The District Judge entered a judgment denying the divorce and the plaintiff appealed to the United States Court of Appeals, Third District.

In the Granville-Smith case, 214 F. 2d 820, involving a similar set of facts, the United States Court of Appeals for the Third Circuit relied upon its decision in the Alton case, 207 F. 2d 667, and affirmed. The basis for the decision in the Alton case which was relied upon was that notwithstanding the act of the Territorial Assembly and

the passage of the divorce law and procedure thereunder authorized and determined that a six weeks continuous residence was sufficient to give the Court jurisdiction to enter a divorce, yet that provision in itself did not comply with the due process clauses of the United States Constitution as set forth in the Fifth Amendment or in what was called the Organic Act where the Congress had authorized the Assembly to pass certain laws for its own internal jurisprudence and procedure. The Third Circuit pointed out that the parties can not by their consent confer jurisdiction of the subject matter upon a Court which does not have authority to deal with the subject matter.

When this Court reviewed the Granville-Smith case above mentioned, it discussed in detail the Organic Act of 1936, wherein the Congress of the United States provided a complete government for the Virgin Islands, including a Legislative Assembly. Without burdening this Court at this stage of the proceeding with all of the details of that landmark decision, the results established that where the Congress of the United States assumed the power to enact legislation over subject matter which it clearly had the right to control—and even to create in this instance—that the granting of power or the restriction of power as contained in the Congressional Act was binding. This Court pointed out that the Congress had limited the type of powers which the Legislative Assembly for the Virgin Islands was granted, and held that the grant by the Legislature did not authorize the passage of a law which would give the District Court of the Virgin Islands the power to accept the mere proof of a six weeks residence as proof of honest intent and domicile so as to give the District Court jurisdiction over a divorce action where those facts and none other were established in the record. Here was a case where the Congress acted, the Legislative Assembly then acted and created these Courts which

had full and complete power as a matter of general jurisdiction over divorces in general, but as this Court said, the Congress had not granted to the Legislative Assembly or to that Court the power to set up procedural standards which were not in accord with the fundamentals of the United States Constitution on due process under the Fifth Amendment or the Fourteenth Amendment.

We think it sufficient by reference to this case to show this Court at this time and at this stage of the procedure that where the Congress adopted a full and comprehensive system for the creation and operation of national banks as a banking system separate and apart from state procedure or state laws, and as a part of that act permitted both state and federal Courts to entertain and have jurisdiction over usury claims against a national bank, they had not only the power but perhaps the duty to see what kind of usury claims could be filed, what kind of procedure could be used, and what was the limit of the jurisdictional grant to either the state or the federal Courts in awarding penalties for usury against a national bank. The Congress did so in no uncertain terms.

We think the doctrine of the cases above mentioned, together with the consideration by this Court of its own opinion in the case of *Southern Construction Company* v. *Pickard,* 371 U.S. 57, 83 S. Ct. 108, should convince this Court that this certiorari should be granted. This was a case involving certain conflicting claims under a Miller Act suit against a contractor and surety growing out of a federal project. The claim was made that the Miller Act, 40 U.S.C. 270b, 40 U.S.C.A. 270b, provided, and we quote from page 109, second column of the reported decision in 83 Supreme Court Reporter:

> "The Miller Act, however, requires that suits instituted under its provisions 'shall be brought * * *

in the United States District Court for any district in which the contract was to be performed and executed and not elsewhere * * *.'"

Under this statute Mr. Pickard determined that he would have to file an action for work which he had performed in Tennessee in the United States District Court for the Middle District of Tennessee and that he would have to file his claim for work done in Georgia in the appropriate United States District Court there. He first brought a suit in the United States District Court for the Middle District of Georgia and then, in determining that he was wrong in including a part of the Tennessee project in the Georgia suit, he filed suit in Tennessee for that portion of the work. The contention was made that under the Federal Rules of Civil Procedure, Rule 13(a), Pickard was required to file any claims or counterclaims in the first suit brought, which would include claims for both the Georgia and the Tennessee projects. This Court reversed such a holding by the United States Court of Appeals for the Sixth Circuit and said (see text, second column, page 110):

"The requirement that counterclaims arising out of the same transaction or occurrence as the opposing party's claim 'shall' be stated in the pleadings was designed to prevent multiplicity of actions and to achieve resolution in a single lawsuit of all disputes arising out of common matters. The Rule was particularly directed against one who failed to assert a counterclaim in one action and then instituted a second action in which that counterclaim became the basis of the complaint. * * *

It is readily apparent that this policy has no application here. In this instance, the plaintiff-respondent, who originally sought to combine all his claims in a single suit, correctly concluded that he was re-

quired by statute to split those claims and to bring two separate actions in two different districts. The fragmentation of these claims, therefore, was compelled by federal law, and the primary defendant in both actions was thus for the first time confronted with the choice of which of the two pending suits should be resorted to for the assertion of a counterclaim common to both. Under these circumstances, we hold that Rule 13(a) did not compel this counterclaim to be made in whichever of the two suits the first responsive pleading was filed."

The gist of this case as applied to the facts in the case at bar was, in our opinion, to hold that where the Congress creating an act such as the Miller Act, created substantive rights and provided for a special and exclusive remedy, that remedy was a part of the whole substantive act and was not amended or cast aside by any provisions of the Federal Rules of Civil Procedure or any other rules of civil procedure in any state Court.

We have never questioned on behalf of the National Bank that Constructors of Florida, Inc., in the early fall of 1957 could have filed a suit in the nature of an action for debt on the law side of the Circuit Court of Dade County, Florida, where Constructors of Florida, Inc., through its receiver, would be the sole plaintiff and the National Bank would be the sole defendant. The receiver could have sought double the amount of $11,500.00, if he could have established before a jury sufficient facts from which the jury could find usury. A total claim under the Federal Statute, Title 12, U.S.C.A., § 86, would have been approximately $23,000.00. This suit could have been carried on while the suit on the equity side of the Court could have proceeded for the foreclosure of these mortgages. Had this orderly and statutory procedure been carried on in line with the statutory restrictions, this case

would not be before this Court. It was not carried on on that basis and the results have been shocking. We do not say that there is any evidence of bad faith or overreaching intentionally by the Courts of the State of Florida, or that any real prejudice was shown against a national bank. However, regardless of the intent, the results were shocking and amounted to a taking and confiscation of the National Bank's property rights without due process of law. We can find no other reported case within the jurisprudence citations of this country, either state or federal, where such a proceeding has ever been upheld.

CONCLUSION

There seemed to be some confusion in the opinion of the United States Court of Appeals, Fifth Circuit, in both of its opinions, 299 F. 2d 736, and 349 F. 2d 595, as to what the Congress meant when it inserted in Title 12, U.S.C.A., § 86, what was intended by the designation of a particular procedure in the nature of an action for debt, with a strict limitation as to the amount that could be recovered. In 1 Am. Jur. 2d 558, § 20, the authors discuss the common law action of debt, stating:

> "The common-law action of debt lies for the recovery of a fixed and definite sum of money or of a sum of money which can be ascertained from fixed data by computation or is capable of being readily reduced to certainty."

The quotations from 1 Am. Jur. 2d 558 are supported by the authors' reference to 23 Am. Jur., § 65, page 655, under the general heading of "Forfeitures and Penalties". Before referring to Section 65 we will point out the statements in the prior Section 64, which are as follows:

> "Thus, where a new and independent obligation for a penalty is created by a statute, the statute must be strictly followed, and where the only remedy is by indictment, and the penalty is not certain, an action for debt will not lie as it lies upon an ordinary penal statute. The rule which excludes other remedies where a statute creates a right and provides a special remedy for its enforcement rests upon the presumed prohibition of all other remedies."

In the notes in support of the statement that the penalty procedure is exclusive and prohibits all other procedure where it is defined in the statute (see *United States* v. *Simms,* 1 Cranch (U.S.) 252, 2 L. Ed. 98; *United States* v. *Stevenson,* 215 U.S. 190, 54 L. Ed. 153, 30 S. Ct. 35.

In 23 Am. Jur., § 45, p. 637, in the last paragraph of said section, the authors make this statement:

> "The remedy by the infliction of a statutory penalty may or may not be exclusive. When a statute imposes a duty where none exists before and prescribes a penalty for failure to perform it, the principle is that such remedy is exclusive."

See also the case of *Sulil Realty Corp.* v. *Rye Motors, Inc.,* Westchester County Court, January 19, 1965, 257 N. Y. S. 111.

We submit that usury penalties were unknown at the common law. There is no general usury legislation under the Acts of Congress. The laws of usury in the various states have no application to claims for usury against national banks. Congress could just as well have prohibited any claim for usury against a national bank, regardless of the statutory provisions of the various states. Instead of that it created a special exclusive definition of usury in Title 12, U.S.C., § 85. It provided for the exclusive and only remedy and the limitation of the amount of a claim

for usury against a national bank. The common law action for debt or action in the nature of debt was a specialized type of exclusive remedy to be used only in certain particular instances. At the time of the inclusion of this statutory provision by the Congress in the national banking laws of this country there was no ambiguity about the procedure or the maximum penalties authorized in said Act. As we have pointed out above, Florida maintains a dual system where law and equity actions are still separate. We have heretofore pointed out that even in a suit in a United States District Court where there is supposed to be only one form of action under the Federal Rules of Civil Procedure, yet if such a suit was brought in the United States District Court under the Federal Rules of Civil Procedure it would require the same classification and entitle the national bank to a jury trial.

The United States District Judge determined in the decree of December 20, 1963, that the National Bank had maintained its objections to the procedure in the State Court by way of counterclaim in an equity action and to the penalty sought to be enforced right from the inception in every stage of the procedure. We emphasize that we have not waived our position at any time. The United States Court of Appeals for the Fifth Circuit in the opinion in 349 F. 2d 595 now under attack recognized that finding by the Court below, but reversed the impact of those objections by holding that since we had raised that point in the State Court at every stage of the procedure, it had certainly been passed upon by the State Court and, therefore, the action of the State Court in refusing to recognize the federal limitations was res judicata.

There have been certain opinions which have been collected in the notes in 1 A. L. R. 3d, beginning at page 904, which have set forth and held in certain instances that

the venue features in Section 5198, United States Statutes, Title 12, U.S.C.A., § 94, could be waived. The controlling case on this point is a decision by this Court in the case of *First National Bank of Charlotte* v. *Morgan*, 132 U.S. 141, 10 S. Ct. 37, 33 L. Ed. 282, an 1889 decision, and while this Court said that the actions of a national bank in entering into and defending a suit in a State Court not in the county of its domicile, without objecting at any time until appellate proceedings took place, would amount to a waiver, but the editorial writers in referring to that case have overlooked the fact that this Court in that same opinion said that in the absence of circumstances creating a waiver, that statute is a fundamental restriction and that the mere waiver of the venue situation would not give the State Court in that particular instance jurisdiction where the claim itself was contrary to the restrictive provisions of the federal statutes.

Perhaps the leading case—or at least one of the first applicable cases on this subject—is the case of *Leonardi* v. *Chase National Bank of the City of New York* (U.S.C.A. 2, 1936), 81 F. 2d 19. In this case a resident of Florida sued a national bank with its principal and central office in the Southern District of New York. It had a branch office at Brooklyn, in the Eastern District of New York. The bank appeared specially to contest the Court's jurisdiction and moved to set aside the service and dismiss the complaint on the ground that the National Banking Laws specifically provided for venue of suits against national banks. After the Judge of the Eastern District of New York denied the bank's motions as to venue, then the bank instead of attempting an interlocutory appeal, which it could not do, tried the case of the merits. Plaintiffs recovered (see 11 F. Supp. 85), but the appellate Court reversed. In a rather comprehensive opinion the Court pointed out that the terms and conditions of the Federal Statute, particularly § 86,

Title 12, as well as other pertinent provisions of Section 5198, was clearly a restriction on jurisdiction. It held that once a national bank makes a timely objection to jurisdiction of the Court based upon the specific limitations of the federal act which conditionally granted jurisdiction and that objection was overruled, it could go ahead and try the case on the merits without waiving or consenting to jurisdiction. This did not keep the lower Court from being reversed and, as was said in this opinion, there was no way in which the proceeding in the Eastern District of New York could be maintained since the Court had "no jurisdiction".

The case at bar presents even a stronger situation, because the question of the inherent lack of jurisdiction in the State Court was maintained throughout the entire proceedings.

The learned Judge who prepared the opinion for the United States Court of Appeals, Fifth Circuit, in holding that the proceedings in the State Court could not be collaterally attacked in these proceedings in the Federal Court relied largely upon the decision from the Tenth Circuit in *Burgess* v. *Nail*, 103 F. 2d 37, and he extracted from that decision a quotation:

> "Error in determination of questions of law or fact on which the court's jurisdiction in particular case depends, the court having general jurisdiction of the cause and of the person, is 'error in exercise of jurisdiction' and affords no ground for collateral attack."

He quotes several other decisions in footnotes 2 and 3, as shown in the reported decision, 349 F. 2d, on page 600: We respectfully say that the citations in question are not in point, because it is shown in the Burgess decision relied upon in the opinion that while the State Court of Oklahoma had general jurisdiction over certain trusts, and even involving Indian affairs, it did not have jurisdiction because

of the Federal Statutes to set aside the trusts. The Burgess decision was written for the Tenth Circuit by Judge Phillips, who was then a Judge of the Tenth Circuit. This same Judge Phillips wrote the opinion for the United States Court of Appeals, Fifth Circuit, now in question. He was sitting by designation in the Fifth Circuit, designated as Senior Judge of the Tenth Circuit. His own interpretation in the last opinion now under question of the Burgess case opinion which he wrote in 1939, differs from the actual wording and holding of his decision in the Burgess case.

Great stress is laid upon the fact that the Circuit Court of Dade County, Florida was a Court of general jurisdiction and under the Constitution of Florida that jurisdiction is set forth as follows (see second column, page 600, of the reported decision):

> "'The circuit courts shall have exclusive original jurisdiction in all cases in equity except such equity jurisdiction as may be conferred on juvenile courts, in all cases at law not cognizable by subordinate courts * * *.'"

We do not question that the Circuit Court had jurisdiction of the foreclosure proceedings as originally instituted. We do say, however, that the Circuit Court of Dade County, Florida under its guise of equity power had no jurisdiction under the doctrine of equity to violate the provisions of Title 12, U.S.C.A., § 86, which only authorized a common law suit in the nature of an action for debt on a claim for usury against a national bank. The Circuit Court of Dade County, Florida is not a Court of general jurisdiction in law matters, because that is determined by the amount in controversy of the type of procedure involved.

However, there is one point now raised in this petition to this Court which has not heretofore been raised in the

two previous petitions for certiorari from the State Court determinations. The moneys, whether rightfully or wrongfully extracted from the National Bank, are in the possession of the Federal Court sitting as a Reorganization Bankruptcy Court. $400,000.00 of the money was extracted by proceedings in the State Court under such type of proceedings that were utterly barred by the Federal Statutes. $106,000.00, plus interest, which had always been within the custody of the Federal Court, was not extracted by any order of an affirmative nature by the equity Court of the State of Florida. That came about solely by virtue of the proceedings in the United States District Court.

It is, therefore, clear that we, on behalf of the Banks, make the contention that since the State Court had no jurisdiction on the usury situation although some $400,000.00 was extracted from the Banks, yet that money has come to repose in the Federal Reorganization Court. The $106,000.00, plus interest, has always been in the Federal Court. It is, therefore, the error of the Federal Court in the disposition of these sums wrongfully extracted that we say the Federal Courts have committed error. The District Judge fully recognized that he certainly could not be bound by any orders of the State Court with reference to the tangible property and the limits thereon which had always been under the control of the Federal Court, and he affirmatively ordered those sums repaid in furtherance of the admitted valid liens of the two July, 1956, mortgages. In addition thereto, an analysis of the opinion of the United States District Judge reflects that he felt that under the decisions relied upon by the Banks he was not bound by the State Court determination of issues as to the usury claims, but that he might be bound under the construction of the United States Court of Appeals, Fifth Circuit, in the first opinion, 299 F. 2d 736. The United States District

Court did not uphold any usury claim, nor did the United States Court of Appeals, Fifth Circuit, ever pass upon the validity of that claim.

We feel that we will not be carrying out our responsibility to this Court if we do not point out with utter candor that we, as attorneys for the Banks, are concerned with our inability to properly construe certain language by this Court in the opinion in the case of *Gene Durfee et ux., Petitioners,* v. *Julia E. Duke,* 375 U.S. 106, 84 S. Ct. 242, a 1963 opinion. This case involved a dispute about some border land on the southern boundary of Nebraska and the northern boundary of Missouri. In the reported decision of the Durfee case, 84 Supreme Court Reporter, text page 244, this Court discussed the constitutional command of full faith and credit as implemented by Congress, to the end that

> "judicial proceedings * * * shall have the same full faith and credit in every court within the United States * * * as they have by law or usage in the courts of such State * * * from which they are taken."

We further quote:

> "Full faith and credit thus generally requires every State to give a judgment at least the res judicata effect which the judgment would be accorded in the State which rendered it. 'By the Constitutional provision for full faith and credit, the local doctrines of res judicata, speaking generally, become a part of national jurisprudence, and therefore federal questions cognizable here.' Riley v. New York Trust Co., 315 U.S. 343, 349, 62 S. Ct. 608, 612, 86 L. Ed. 885."

It is then pointed out in this opinion, second column of the text on page 244, that in many decisions this Court has held that a judgment of a Court in one state is conclusive upon the merits in a Court in another state only

if the Court in the first state had the power to pass upon the merits—had jurisdiction, that is, to render the judgment. The Court quoted from Mr. Justice Bradley, as follows:

> "As Mr. Justice Bradley stated the doctrine in the leading case of Thompson v. Whitman, 18 Wall. 457, 21 L. Ed. 897, 'we think it clear that the jurisdiction of the court by which a judgment is rendered in any State may be questioned in a collateral proceeding in another State, notwithstanding the provision of the fourth article of the Constitution and the law of 1790, and notwithstanding the averments contained in the record of the judgment itself.'"

While the ultimate decision by this Court in the Durfee case would—inferentially at least—imply that where parties are before a state Court and the matter of the state Court's jurisdiction is litigated, regardless of whether the state Court was right or wrong, there could be no collateral attack, yet we do find in this Durfee case an explicit determination that there is another rule where the doctrines of federal preemption or sovereign immunity may be controlling.

This Court relied upon *Kalb* v. *Feuerstein*, 308 U.S. 433, 60 S. Ct. 343, 84 L. Ed. 370, and *United States* v. *United States Fidelity & Guaranty Co.*, 309 U.S. 506, 60 S. Ct. 653, 84 L. Ed. 894. We submit that these two cases are directly applicable to the facts at bar and are controlling.

In the Kalb case there was a question as to the power of the Wisconsin County Court, which had general jurisdiction over mortgage foreclosures under the Wisconsin law. The Frazier-Lemke Act enacted by Congress in the exercise of its supreme power over bankruptcy denying to any state court jurisdiction over a petitioning farmer-debtor or

his property rendered the confirmation of a mortgage foreclosure sale and its enforcement without bankruptcy court's consent beyond the county court's power, and that when such a decision was entered it was beyond the jurisdiction of the Court and void. In headnote 4 we find this statement, as announced by the Court in its opinion:

Headnote 4:

"The states cannot, in the exercise of control over local laws and practice, vest state courts with power to violate the supreme law of the land."

Headnote 5:

"Under its constitutional power to regulate bankruptcy, Congress can limit the jurisdiction which courts, state or federal, can exercise over the person and property of a debtor who duly invokes the bankruptcy law."

Headnote 8:

"The language and broad policy of the Frazier-Lemke Act conclusively show that Congress deprived a Wisconsin county court of jurisdiction to continue or maintain in any manner mortgage foreclosure proceedings against farmer-debtors without consent, after hearing, of bankruptcy court in which farmer-debtors' petition was pending, and hence confirmation of mortgage foreclosure sale, execution of sheriff's deed, writ of assistance, and ejection of farmer-debtors from their property, to the extent based upon county court's actions, were all unlawful."

This Court further held in that case that such an act deprived the County Court, a Court of general jurisdiction,

the jurisdiction to make any valid or binding orders in the face of the restrictive provisions of the federal law.

The second case mentioned, *United States* v. *United States Fidelity & Guaranty Co.*, raised a problem that is somewhat similar, but not exactly on factual similarity, to the facts in the Kalb case. There was a reorganization proceeding in the Federal District Court for Missouri where the lessee of certain coal lands of the Choctaw and Chickasaw Nations were seeking a reorganization. Two questions were involved in that certiorari proceeding to this Court, set forth in the opinion in 60 Supreme Court Reporter, page 655, as follows:

> "This certiorari brings two questions here for review: (1) Is a former judgment against the United States on a cross-claim, which was entered without statutory authority, fixing a balance of indebtedness to be collected as provided by law, res judicata in this litigation for collection of the balance; and (2) as the controverted former judgment was entered against the Choctaw and Chickasaw Nations, appearing by the United States, does the jurisdictional act of April 26, 1906, 34 Stat. 137, authorizing adjudication of cross demands by defendants in suits on behalf of these Nations, permit the former credit, obtained by the principal in a bond guaranteed by the sole original defendant here, to be set up in the present suit."

There was no question but what there had been some prior adjudications in one of the Missouri courts, in which all of the parties had apparently joined, but this Court held that the Congress had exempted suits against the Indian Nations, except as specifically authorized by Congress.

This Court held that this immunized the Indian Nations and the United States acting for them from direct suits, or even suits by way of counterclaim, except in the event of the cross or counterclaim provision being made for such a counterclaim in "any United States Court in the Indian territory", and the Court pointed out that with this expressed [redacted] restriction by the Congress such a judgment was not only void, but that it did not and could not have any effect as res judicata.

This Court is certainly not precluded by any of the past procedure in the State Court, or even in the two attempted applications for certiorari from the State Court proceedings, to review this whole matter and to render such judgments as are required in the control of the disposition of the funds now under the control of the United States District Court, Southern District of Florida. We need only to mention the last expression by this Court as of October 18, 1965, in the case of *Gondeck* v. *Pan American World Airways, Inc.*, case No. 919, reported in the November 15, 1965, Advance Sheet of 86 S. Ct. 153. One statement contained in headnote 1 of the reported decision will show the pertinency of this case to the question at hand:

> "Interest in finality of litigation must yield where interests of justice would make strict application of rules unfair."

We respectfully say that this Court is not precluded from the consideration of this case because of any doctrine of estoppel or res judicata by the invalid State Court procedures, but that it should determine the federal questions involved and require that the statutory procedure and lim-

itations of the Acts of Congress, Title 12, U.S.C.A., § 86, be strictly followed.

Respectfully submitted,

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APPENDIX A

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 21448

IN THE MATTER OF CONSTRUCTORS OF FLORIDA, INC., Debtor in Reorganization

AMERICAN SURETY COMPANY OF NEW YORK,
Appellant,

versus

THE CORAL GABLES FIRST NATIONAL BANK and JOHN NICHOLAS, Trustee,
Appellees.

IN THE MATTER OF CONSTRUCTORS OF FLORIDA, INC., Debtor in Reorganization

THE CORAL GABLES FIRST NATIONAL BANK,
Appellant,

versus

AMERICAN SURETY COMPANY OF NEW YORK and JOHN NICHOLAS, Trustee,
Appellees.

Appeals from the United States District Court for the Southern District of Florida.

(June 30, 1965.)

Before TUTTLE, Chief Judge, and PHILLIPS,* and WISDOM, Circuit Judges.

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*Senior Judge of the Tenth Circuit, sitting by designation.

PHILLIPS, Circuit Judge: These appeals are from an order of the United States District Court for the Southern District of Florida entered in a Chapter X reorganization proceeding. The reorganization debtor, Constructors of Florida, Inc., will hereinafter be referred to as Constructors.

A phase of the reorganization proceeding here involved was before this court on a former appeal, *Coral Gables First Nat. Bank* v. *Constructors of Florida, Inc.*, 5 Cir., 299 F.2d 736, and much of the facts here pertinent are set forth in the opinion in that case. Many of the facts here pertinent are also set forth in more detail in a related state court proceeding, *Coral Gables First Nat. Bank* v. *Constructors of Fla.*, 119 So.2d 741, c.d. 123 So.2d 349, c.d. 365 U.S. 811.

In January, 1957, the Coral Gables First National Bank and the Pan American Bank of Miami, a Florida state bank, hereinafter referred to individually as Coral Gables and Pan American and collectively as the Banks, brought an action in the Circuit Court of Dade County, Florida (Chancery No. 205613E) to foreclose three chattel mortgages given to them by Constructors to secure three loans dated July 24, 1956, July 25, 1956, and March 20, 1957, upon which there was alleged to be due the sums of $13,888.95, $92,690.85 and $151,802.46, respectively. American Surety Company of New York, hereinafter referred to as Surety, and the City of West Palm Beach were joined as defendants, the Banks alleging that they were liable for any deficiency remaining after foreclosure. Constructors counterclaimed against the banks for penalties for usury allegedly charged by the Banks in connection with the March 20, 1957, loan in violation of Federal and State law, and Surety counterclaimed against the Banks for damages it allegedly incurred because of false infor-

mation furnished to it by the Banks as to the financial condition of Constructors and also claimed a prior lien on the property described in the mortgages.

In October, 1957, an involuntary petition in bankruptcy was filed against Constructors and the Bankruptcy Court by appropriate orders authorized the State Court litigation to proceed to final determination and the receiver to appear therein in behalf of the debtor. In November, 1958, a petition for reorganization under Chapter X was filed and an order was entered authorizing the Trustee in the reorganization proceeding to continue to prosecute the claims asserted by the debtor in the State Court action. In December, 1958, a proposed plan of reorganization was filed which provided for the continuation of the State Court litigation. The plan in part read:

"Article I.

Definitions.

"* * * the following terms, when used in the Plan, shall have the meanings respectively attributed to them below.

* * * * * *

"Bank Litigation: That certain litigation entitled Coral Gables First National Bank, et al, v. Constructors of Florida, et al, in the Circuit Court of the Eleventh Judicial Circuit, in and for Dade County, Florida, in Chancery, case number 205613, together with all appellate or review proceedings which have arisen or may hereafter arise therefrom.

"Net Proceeds of Bank Litigation: The net amount recovered by Debtor or Trustee out of Bank Litigation, after payment of all costs, expenses and attorney's fees arising therefrom.

* * * * *

"Article IV.

Classification of Creditors

* * * * *

"A. Secured Claims:

"Class I—The claim of American Surety Company of New York, Or the claim of Pan American Bank of Miami and Coral Gables First National Bank, against the Debtor, to the extent of the value of the Debtor's property encumbered to secure such claim, *it being understood that whether either of said claimants shall be entitled to be considered secured, and the relative priority of their said claims, if valid, will be dependent upon the final outcome of Bank Litigation*; * * *" (Italics ours)

The plan was approved by the court on December 15, 1958.

On January 5, 1959, Coral Gables filed a claim in the amount of $282,548.83. Its claim stated in part as follows:

"That the consideration of said debt is for moneys loaned on security. (See in detail all proceedings Circuit Court of Dade Co., Florida, Chancery No. 205613E and reference to matters on appeal, District Court of Appeals, Third District, No. 58-526, said proceedings being referred to in the petition and previous orders of this Court entered herein, full reference to same made a part hereof.)"

On the same date Surety filed a claim in the amount of $1,691,483.72 "of which $50,000.00 is estimated to be secured and $1,641,483.72 unsecured."

On March 6, 1959, Coral Gables filed a consent to the plan which stated that it "approves and accepts the plan of reorganization and consents to the Court entering an order confirming the plan of reorganization."

On March 11, 1959, the Bankruptcy Court confirmed the reorganization plan with certain modifications not here material.

Meanwhile, on June 26, 1958, the Florida State Court had entered its "Partial Final Decree" in the Bank litigation. That court found that the Banks were joint adventurers and agents of each other and that the Banks had charged usurious interest in connection with the March 20, 1957, transaction in violation of §§ 687.04 and 687.07, Florida Statutes, 1957. The court held that because of such usury Coral Gables was liable to Constructors under 12 U.S.C.A. § 86 for double the amount of interest collected; that Pan American was liable to Constructors under § 687.07, *supra*, for all the principal and interest paid by Constructors on the usurious transaction; and that under § 687.07, *supra*, the principal and interest allegedly remaining due the Banks on the March 20, 1957, transaction should be cancelled.

With respect to the other two mortgages, foreclosure of which was sought, the Court adjudged that while the debts were still owing, the Banks were barred from obtaining foreclosure of the mortgages, relief equitable in nature, because they were "not in equity with clean hands," and that the lien of Surety against the personalty described in such mortgages was superior to that of the Banks. That judgment was appealed to the District Court of Appeals, Third District, where it was held that the Circuit Court of Dade County erred in forfeiting Coral Gables' proportionate share of the unpaid principal of the March 20, 1957, loan since such forfeiture constituted a

penalty in excess of that permitted to be imposed upon a national bank by 12 U.S.C.A. Sec. 86,[1] adjusted the proportionate participation of the two Banks in the transaction of March 20, 1957, and modified the judgment in one other respect not here material. In all other respects the judgment below was affirmed. Certiorari was denied by the Florida Supreme Court (123 So.2d 349) and by the United States Supreme Court (365 U.S. 811). Thereafter, the court below made additional findings, modified its decree to conform with the mandate of the Court of Appeals and adjudged that the Banks were also barred from obtaining foreclosure of the mortgage made in connection with the transaction of March 20, 1957, because they were "not in equity with clean hands." No appeal was taken from the modified decree.

In April, 1961, the Banks petitioned the Bankruptcy Court for an injunction prohibiting further State Court proceedings and any enforcement of or execution on the State Court judgment. That relief was denied and the Bankruptcy Court authorized the Trustee to execute on the State Court judgment. The Banks appealed from that order to this court and we affirmed, holding that the Bankruptcy Court had the power to permit continuance of the State Court litigation and that the State Court had jurisdiction to make and had made a judicial determination

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1. 12 U.S.C.A. Sec. 86 provides as follows:

"The taking, receiving, reserving, or charging a rate of interest greater than is allowed by the preceding section, when knowingly done, shall be deemed a forfeiture of the entire interest which the note, bill, or other evidence of debt carries with it, or which has been agreed to be paid thereon. In case the greater rate of interest has been paid, the person by whom it has been paid, or his legal representatives, may recover back, in an action in the nature of an action of debt, twice the amount of the interest thus paid from the association taking or receiving the same: *Provided*, That such action is commenced within two years from the time the usurious transaction occurred."

of the claims and cross-claims of the Constructors and the Banks. We refrained from expressly determining the questions of priorities and enforcement of security by the Banks and other creditors as those issues were not directly before us on that appeal.

Based upon this court's opinion and the State Court judgment the Trustee then filed additional objections to the claim of the Banks, objecting to the allowance and classification of the Banks' claim as a secured claim, and to participation by the Banks in the proceeds of the recovery made by the Trustee in the Bank litigation and asserting that the Banks' claim should be allowed as an unsecured claim only in the amount determined to be owing by the State Court.

The Banks moved for an order directing the Trustee to pay to them the moneys previously recovered by him in the State Court action stating as its grounds therefor the following: "The decree of the State Court is void insofar as the usury features are concerned, and any money erroneously collected therefrom is a trust fund now in the hands of the Trustee in Chapter X Reorganization Proceedings in this case. The opinion of the State Court is therefore subject to the claim that it lacked jurisdiction, and therefore it is a void judgment which is not binding on anyone and particularly not binding upon this Court. It is the duty of this Court sitting as a Court of equity as well as a Chapter X Reorganization Court, to direct the return of funds which have been specifically traced and which have not yet been disbursed. These funds should be returned to the parties from whom they were received."

After argument on the motion of the Banks and the objections of the Trustee to the claim of the Banks, the U. S. District Court for the Southern District of Florida,

Miami Division, held that the Banks were barred by res judicata from attacking the determination by the State Court of its jurisdiction, but that the mortgages held by the Banks were valid and enforceable. The Court ordered that the motion of the Banks for an order directing the Trustee to pay to them the moneys collected in the State Court action be denied; that the Banks and Surety had valid liens against the proceeds from the sale of the property covered by the mortgages; that the matter of the relative priorities between the Banks and Surety be referred to the Referee in Bankruptcy as Special Master; that the Banks be awarded a secured claim in the amount found by the State Court to be due to them against the proceeds from the sale of the property covered by their mortgages and an unsecured claim for the deficiency; and that the Trustee's objections to the allowance of the Banks' claim as a secured claim be overruled.

The Banks have appealed from that order insofar as it sustained the objections of the Trustee to their claim, failed to determine the priority of the Banks' claim as against Surety's claim, and overruled their motion ordering the Trustee to pay over to them the moneys recovered in the State Court action.

Surety has appealed from that order insofar as it allowed the claim of the Banks as a secured claim and overruled the objections of the Trustee to the allowance of the claim of the Banks as a secured claim.

The Trustee has taken the position that the order of the Court below should be reversed to the extent that it fails to give full force and effect to the State Court judgment and in all other respects should be affirmed, but has not filed a notice of appeal.

The Banks contend that the Circuit Court of Dade County, Florida, had no jurisdiction to determine the issue of usury committed by a national bank raised by Constructor's counterclaim. We are of the opinion, however, that that question has been finally adjudicated and conclusively settled as between these parties by previous adjudications not now open to attack by the Banks.

The doctrine of res judicata embodies two main rules which may be stated as follows:

(1) The final judgment or decree of a court of competent jurisdiction upon the merits concludes the parties and their privies to the litigation, and constitutes a bar to a new action or suit upon the same cause of action either before the same or any other tribunal.

(2) Any right, fact or matter in issue and directly adjudicated, or necessarily involved in the determination of an action before a competent court in which a judgment or decree has been rendered upon the merits, is conclusively settled by the judgment therein and cannot again be litigated between the same parties and their privies, whether the claim, demand, purpose or subject-matter of the two suits is the same or not.

The principle of the first rule is referred to as "bar by former judgment," and the second as "conclusiveness of judgment."[2]

The action brought by the Banks for an injunction prohibiting further State Court proceedings which was the subject of the earlier appeal to this court directly presented on the merits the issues of whether the Bankruptcy Court had the power to direct the continuance of the State Court litigation and whether the Circuit Court

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2. Henderson v. United States Radiator Corporation, 10 Cir., 78 F.2d 674, 675.

To the same effect see: United States v. Burch, 5 Cir., 294 F.2d 1, 5; Kelliher v. Stone & Webster, 5 Cir., 75 F.2d 331, 333.

of Dade County, Florida, had the power to determine the claims between Constructors and the Banks. The order of the Bankruptcy Court denying such injunctive relief and permitting execution by the Trustee on the State Court judgment, after affirmance by this court conclusively settled those issues between the parties. Such issues cannot again be litigated on the petition of the Banks for an order directing the Trustee to pay back the funds obtained through execution on the State Court judgment. Although the demand is different, the issues are identical.

Furthermore, the Banks are also concluded by the issues adjudicated by the State Court and may not relitigate those issues in this proceeding. The claim of the Banks that the State Court was without jurisdiction to adjudicate the issues of usury and the right to foreclose the mortgages and relative security rights of the Banks and the Surety to the property described in the mortgages is not well taken. The determination by a court of general jurisdiction of its own jurisdiction is conclusive as to the parties and their privies. In *Burgess* v. *Nail*, 10 Cir., 103 F.2d 37, 43-44, the court said:

> "* * * Error in the determination of questions of law or fact upon which the Court's jurisdiction in the particular case depends, the court having general jurisdiction of the cause and the person, is error in the exercise of jurisdiction. Such an error affords no ground for collateral attack."[3]

The Florida Constitution, Article 5, Sec. 6(3), (F.S.A. Const. Article 5, Sec. 6(3)) establishes the jurisdiction of Circuit Courts in that State as follows:

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3. See also: Bostwick v. Baldwin Drainage Dist., 5 Cir., 133 F.2d 1, 4-5, c.d. 319 U.S. 742; Greene v. Uniacke, 5 Cir., 46 F.2d 916, 920-921, c.d. 283 U.S. 847; Stoll v. Gottlieb, 305 U.S. 165, 172; Baldwin v. Travelling Men's Ass'n., 283 U.S. 522, 525-526; 49 C.J.S. Judgments, Sec. 427, p. 849.

"(3) *Jurisdiction.* The circuit courts shall have exclusive original jurisdiction in all cases in equity except such equity jurisdiction as may be conferred on juvenile courts, in all cases at law not cognizable by subordinate courts * * *."

The Banks concede that they contested the jurisdiction of the State Court in that forum and the court below so found. Moreover, the Circuit Court of Dade County was required of necessity to determine its own jurisdiction as an integral part of the proceedings in the Bank litigation. Therefore, that determination is conclusive as to that issue as among the parties to that action and the Banks may not litigate it again. The court below did not err in denying the motion of the Banks for an order directing the Trustee to pay back to them the funds obtained through execution on the State Court judgment.

However, we are of the opinion that the court below erred in failing to treat the determination by the Circuit Court of Dade County that the chattel mortgages of the Banks were unenforceable as conclusive upon the parties to that proceeding. "The doctrine of conclusiveness of judgment applies alike to the decrees of courts exercising equity jurisdiction and to the judgments of courts of law."[4]

The Circuit Court of Dade County had exclusive equity jurisdiction.[5] Since the Bank litigation was commenced by the Banks for the purpose of foreclosing its mortgages, the issue of the enforceability of those mortgages was necessarily involved in the determination by that court of that action, and the parties to the Bank litigation are also parties in the instant case. Thus, the determination by the Circuit Court of Dade County that the mortgages were unenforceable for equitable reasons is conclusive as to those parties and may not again be litigated by them.

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4. 50 C.J.S., Judgments, Sec. 692, p. 150.
5. F.S.A. Const. Art. 5, Sec. 6(s), supra.

Also, Article IV of the Reorganization Plan, *supra*, clearly contemplated that the validity of the claimed security of Surety and the Banks would be left for determination by the State Court in the Bank litigation. Not only did the Banks fail to appeal from the order confirming that plan, but also they affirmatively approved and accepted the plan and consented to its confirmation by the court.

11 U.S.C.A. Sec. 624, provides in part as follows:

"Upon confirmation of a plan—

"(1) The plan and its provisions shall be binding upon the debtor, upon every other corporation issuing securities or acquiring property under the plan, and upon all creditors and stockholders, whether or not such creditors and stockholders are affected by the plan or have accepted it or have filed proofs of their claims or interests and whether or not their claims or interests have been scheduled or allowed or are allowable."

The Banks are bound by the provisions of the reorganization plan and since the confirmation order was not appealed, the determination by the Bankruptcy Court in its confirmation order pursuant to 11 U.S.C.A. Sec. 621 that the plan complied with subchapter X of Chapter X of the Bankruptcy Act and that the plan was fair and equitable and feasible is not now open to attack.[6]

Therefore, the judgment of the court below should be affirmed insofar as it gives effect to the judgment of the State Court in the Bank litigation and reversed insofar as it sustained the validity of the mortgages of the Banks determined by the State Court to be unenforceable.

Remanded for further proceedings in accordance herewith.

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6. 11 Remington on Bankruptcy Sec. 4712 ((1961) Revision).

APPENDIX B

United States Court of Appeals

FOR THE FIFTH CIRCUIT

OCTOBER TERM, 1964

No. 21448

D. C. Docket No. 3736-Bk-Ec

IN THE MATTER OF CONSTRUCTORS OF FLORIDA, INC., Debtor in Reorganization

AMERICAN SURETY COMPANY OF NEW YORK,
Appellant,

versus

THE CORAL GABLES FIRST NATIONAL BANK and JOHN NICHOLAS, Trustee,
Appellees.

IN THE MATTER OF CONSTRUCTORS OF FLORIDA, INC., Debtor in Reorganization

THE CORAL GABLES FIRST NATIONAL BANK,
Appellant,

versus

AMERICAN SURETY COMPANY OF NEW YORK and JOHN NICHOLAS, Trustee,
Appellees.

Appeal from the United States District Court for the Southern District of Florida.

Before TUTTLE, Chief Judge, and PHILLIPS,* and WISDOM, Circuit Judges.

*Senior Judge of the Tenth Circuit, sitting by designation.

Judgment

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Florida, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby affirmed in part, and reversed in part; and that this cause be, and it is hereby remanded to the said District Court for further proceedings in accordance with the opinion.

It is further ordered and adjudged that the appellee-appellant, The Coral Gables First National Bank, be condemned to pay the costs of this cause in this Court for which execution may be issued out of the said District Court.

June 30, 1965

Court Costs:

Docketing cause, etc.	$ 25.00
Cost of Printing Record	$1226.75
Total	$1251.75

Issued as Mandate: Sep 13 1965

APPENDIX C

United States Court of Appeals

FIFTH CIRCUIT

No. 21,448

IN THE MATTER OF CONSTRUCTORS OF FLORIDA, INC., Debtor in Reorganization.

AMERICAN SURETY COMPANY OF NEW YORK,
Appellant,

vs.

THE CORAL GABLES FIRST NATIONAL BANK and JOHN NICHOLAS, Trustee,
Appellees.

IN THE MATTER OF CONSTRUCTORS OF FLORIDA, INC., Debtor in Reorganization.

THE CORAL GABLES FIRST NATIONAL BANK and PAN AMERICAN BANK OF MIAMI,
Appellants,

vs.

AMERICAN SURETY COMPANY OF NEW YORK and JOHN NICHOLAS, Trustee,
Appellees.

PETITION FOR REHEARING

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Statute 5198, Title 12, U.S.C.A. § 86 ..... 20, 21
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United States Court of Appeals

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PETITION FOR REHEARING

Come now the appellants, THE CORAL GABLES FIRST NATIONAL BANK and PAN AMERICAN BANK OF MIAMI, and respectfully petition the Court to grant a

rehearing and a reconsideration of the opinion of June 30, 1965, for the following reasons:

The opinion prepared for the Court by Judge Phillips, Senior Judge of the Tenth Circuit, and adopted without dissent by the other two members of this Court, seems to be based upon three assumptions. The first assumption is a matter of law, but is not as clearly pointed out in the opinion as it had been in a statement from the Bench made by Judge Phillips at the time of oral argument.

The controversial case, which from a matter of law seems to have been the focal point throughout this entire litigation, was whether the case of *John R. Alley & Co. v. Federal National Bank of Shawnee, Oklahoma* was in conflict with the then existing decision of the Supreme Court of the United States of *McCollum* v. *Hamilton National Bank*, 303 U. S. 245, 58 S. Ct. 568, 82 L. Ed. 819. These two cases were discussed in the brief of the appellant Banks, the first being discussed on pages 7 and 8 and the latter case being discussed at page 36.

In the McCollum case the Supreme Court of the United States pointed out that usury penalties or the right to claim a penalty for usury against a national bank was covered by two statutes of the United States—Section 5197, which is now referred to as Title 12, § 85, U.S.C.A., and Section 5198, which is Title 12, § 86. For the purposes of this petition it is only necessary to consider the McCollum case in the light of the two statutes above mentioned.

Section 85 fixes the right of a national bank doing business in a state as to the rate of interest it may legally charge. The rate is specifically fixed, but there is the added provision in Section 85, which is put in there as an exception, and we quote:

> "except that where by the laws of any State a different rate is limited for banks organized under State laws, the rate so limited shall be allowed for associations organized or existing in any such State under this chapter."

This creates a binding control on the right of a national bank to charge interest on a loan and fix the rate thereon. This is a federal law and violation of Section 85 is a violation of a federal law—not a violation of a state law (see *Tiffany* v. *National Bank*, Mo. 1873, 18 Wall. 409, 21 L. Ed. 862).

Statute 5198 (12 U.S.C.A., § 86), which section is copied in the footnote on page 6 of the printed opinion, fixes the penalty where a federal bank violates the provisions of Section 85, and in the same act and as a part of the same section fixes the exclusive remedy, and we quote:

> "In case the greater rate of interest has been paid, the person by whom it has been paid, or his legal representatives, may recover back, in an action in the nature of an action of debt, twice the amount of the interest thus paid from the association taking or receiving the same."

In the McCollum case and in the other federal cases which we have mentioned in our brief, as well as in all of the state cases on the subject, the remedy and the procedure for the enforcement have been held to be exclusive. It has been held that even where there is no penalty under the state law, nevertheless where a federal bank has violated the federal law there is a right for recovery (see *In re Wild*, C.C.N.Y. 1873, 11 Blatchf. 243 Fed. Cas. No. 17,645).

In attempting to analyze the position of this Court in its opinion of June 30, 1965, we have sincerely sought to determine just why there should be any confusion about the

law of this case, because it seems clear that the result of the case under consideration has clearly violated the federal restrictions, rights, remedies and forfeiture penalties many times beyond the specific and exclusive remedies permitted.

In the John R. Alley case from the Tenth Circuit (January 13, 1942) the McCollum decision, which had been rendered on February 28, 1938, was discussed. In the opinion of the Tenth Circuit (see text, first column, p. 997) it is said:

> "It has been held without exception that the right granted by the statute can be asserted only in a separate and independent action in the nature of an action in debt."

quoting cases beginning with *Barnet* v. *Muncie National Bank*, 98 U. S. 555, 25 L. Ed. 212, and ending with the last case of *McCollum* v. *Hamilton National Bank*, 303 U.S. 245, 58 S. Ct. 568, 82 L. Ed. 819. The opinion continues further:

> "The rationale of these cases is that where, as here, the statute creates a right or offense and provides a specific remedy or punishment, those provisions are exclusive and the liability can be enforced only in an action brought specifically and exclusively for that purpose."

Then the opinion continues (see second column, p. 997):

> "All of these decisions antedate the adoption of the New Rules of Civil Procedure, 28 U.S.C.A. following section 723c, and our question is to determine whether the adoption of the new rules has modified the rule announced in these decisions."

Then the Court proceeded to hold that since the Federal Rules of Civil Procedure provided for compulsory counterclaims, the exclusive features of Title 12, § 86, were repealed. The said opinion further laid down the rule that if there is a conflict between the procedure provided for in the statute for the enforcement of the right created thereby and that provided for in the Rules of Civil Procedure, the statutory exclusive remedy is abolished and yields to the Federal Rules of Civil Procedure. The Court relied upon the case of *Sibbach* v. *Wilson & Co.*, 312 U. S. 1, 61 S. Ct. 422, 427, 85 L. Ed. 479. We respectfully say that a reading of that case would call for a different conclusion. In 61 Supreme Court Reporter, at page 424, we find this statement by the Supreme Court:

> "Hence we conclude that the Act of June 19, 1934, was purposely restricted in its operation to matters of pleading and court practice and procedure. Its two provisos or caveats emphasize this restriction. The first is that the court shall not 'abridge, enlarge, nor modify the substantive rights', in the guise of regulating procedure. The second is that if the rules are to prescribe a single form of action for cases at law and suits in equity, the constitutional right to jury trial inherent in the former must be preserved. There are other limitations upon the authority to prescribe rules which might have been, but were not mentioned in the Act; for instance, the inability of a court, by rule, to extend or restrict the jurisdiction conferred by a statute."

The statement in the Alley case based upon this Supreme Court opinion of 1941, while it may have been the law of the Tenth Circuit, so far as we can tell has never been followed by any other Court, either state or federal, unless it can be said that the Florida Courts adopted that procedure in the instant case.

In a research of this Alley case we find it mentioned only several times, but on other points. However, it was mentioned to some degree in the case of *Couch* v. *United States* (U.S.C.A. Dist. of Col., 1956), 235 F. 2d 519. In that case, which involved a criminal appeal, the trial judge in the United States District Court had not strictly followed Rule 32(a) of the Federal Rules of Criminal Procedure at the time of entering sentence. The Appellate Court, in a panel consisting of eight judges, refused to hold that the Federal Criminal Rules were binding as a matter of law to the extent that a slight variation would vitiate the trial. One judge, Judge Fahy (see second column text, p. 521), dissented and held that Rule 32(a) of the Federal Criminal Rules has the force and effect of law and that the rule meant what it said and there could be no deviation. He quoted the John R. Alley case as his authority.

This Court has clearly held in the case of *First National Bank of Birmingham* v. *Daniel*, a 1956 decision, 239 F. 2d 801, that the recovery of usury against a national bank was restricted to twice the sum paid for interest within a two-year statutory period prior to the suit. No Court so far as we can find, excepting the decision of the Tenth Circuit in the Alley case and the case now in question in the Constructors of Florida case, has ever entertained or permitted a proceeding for usury against a national bank except in strict accord with the statute as to the procedure and the right to separate suit.

In speaking of the effect of the Rules of Civil Procedure and proposed amendments Mr. Justice Black and Mr. Justice Douglas (see 83 Supreme Court Reporter, page 43) commented upon the fact that they had objected to some of the proposed amendments which were not adopted because the amendments were getting away from the limited purposes of the Federal Rules of Civil Procedure and

beginning to abridge constitutional or statutory rights which were enjoyed as a matter of substance. These statements are important not just because they were made by two Justices of the Court, but because they were made at a time when the entire Court had before it for consideration the case of *Southern Construction Company* v. *Pickard*, 371 U. S. 57, 83 S. Ct. 108. This was a per curiam opinion by the entire Court, without any dissent. Here was a suit under the Miller Act. The Court points out (see text, p. 109):

> "The Miller Act, however, requires that suits instituted under its provisions 'shall be brought * * * in the United States District Court for any district in which the contract was to be performed and executed and not elsewhere * * *.' Since this statute appeared to prohibit an action in the Georgia District Court on the Tennessee project, Pickard in April 1957 filed the present action against petitioners in the United States District Court for the Middle District of Tennessee relating to the Tennessee project only."

Then it is pointed out that the Georgia action proceeded to trial and there were some decisions reached because of the dismissal of the counterclaim theory in Georgia. Then in the Tennessee action it was pleaded that Southern's action was barred by the doctrine of res judicata. In the proceedings in Tennessee the District Court apparently allowed the $35,000.00 claim which had originally been involved in the Georgia Court, but the Court of Appeals for the Sixth Circuit reversed (see 293 F. 2d 493). That Appellate Court held that since there had been no allocation of the $35,000.00 payment as between the Georgia and Tennessee projects, that item under Rule 13(a) of the Federal Rules of Civil Procedure, 28 U.S.C.A., was a potential compulsory counterclaim and it should have been filed notwithstanding the provisions of the Miller Act. In other

words, the Sixth Circuit following the doctrine of the Tenth Circuit in the Alley case said that the Federal Rules of Civil Procedure superseded or in effect repealed the statutory provisions for procedure.

The Supreme Court, however, reversed the Sixth Circuit and the Supreme Court unanimously held that the statutory relief and procedure fixed in the Miller Act controlled, and in effect it held where the statute provided the type of procedure and the place of the procedure, that procedure was properly followed and that was the exclusive remedy, using these words (see text, p. 110):

> "In this instance, the plaintiff-respondent, who originally sought to combine all his claims in a single suit, correctly concluded that he was required by statute to split those claims and to bring two separate actions in two different districts. The fragmentation of these claims, therefore, was compelled by federal law, and the primary defendant in both actions was thus for the first time confronted with the choice of which of the two pending suits should be resorted to for the assertion of a counterclaim common to both. Under these circumstances, we hold that Rule 13(a) did not compel this counterclaim to be made in whichever of the two suits the first responsive pleading was filed. Its assertion in the later suit, to which Southern, not without reason, considered it more appurtenant, by no means involved the circuity of action that Rule 13 (a) was aimed at preventing."

An action for debt, which is provided for as the exclusive remedy in Title 12, U.S.C.A., § 86, is a well known and specific common law remedy and has been carried into practically all of the states at one time or another (see 1 Am. Jur. 2d, p. 558). The authors point out that the action for debt would lie where there could be a specific claim even based on a quantum meruit, but that it does not lie for unliquidated damages. They point out that an

action in debt or in the nature of debt lies to recover statutory penalties or to recover import duties. It is clear to understand why the Congress made reference to the action for debt, because (1) it clearly defined the forfeiture features that could be determined; (2) it would not permit claims for torts, damages or anything of that type—it was simply restricted to the claim for forfeiture under statutory penalties or similar actions; and (3) it was a common law action in which juries were to hear the evidence and where no other issues could be involved.

If this procedure had been followed in the present case either the Constructors of Florida in its own right, or its receiver or trustee in Bankruptcy, would have been required to file a suit in the nature of a plenary action in debt. The Coral Gables First National Bank, which was the lender and owned title to all of the assets, would have been the sole defendant. Constructors of Florida would have had the burden of proving the usury to the satisfaction of a jury. No other issues would have been involved. If the jury was satisfied that more than the legal rate of interest had been charged or contracted for, it could not have entered any judgment except for double the amount of the interest actually paid, which in this case would have been double approximately $11,000.00. The national bank would have in its other procedure reduced its claim and taken over security with a deficiency over, if the security was not sufficient.

Usury penalties while civil on one side may be criminal under some of the statutes in some states. Florida is one of those states. So the Coral Gables First National Bank, or its officers, could be guilty of a misdemeanor. Certainly no one would charge that it could be convicted in a trial without a jury.

We think that herein lies the main reason for misunderstanding. Apparently the Courts of Florida, and even this Court, have followed the doctrine that no substantive right of the national bank had been violated; that it makes no difference what type of action was utilized, what Court heard the case, or what kind of results were obtained. The theory of this opinion concerning which we seek a rehearing might easily be summarized by simply stating that the plaintiffs in the Court below selected the state Court for the foreclosure of its mortgage, and that, therefore, anything that happened after that time was up to the state Court and if it made a mistake or violated the strict and clear concepts of the federal law, we had no remedy. May we point out that the Supreme Court of the United States in the case of *Douglas* v. *State of Alabama* (April 5, 1965), 85 S. Ct. 1074, said (text p. 1078):

> "* * * we follow our consistent holdings that the adequacy of state procedural bars to the assertion of federal questions is itself a federal question. See Wright v. Georgia, 373 U.S. 284, 289-291, 83 S. Ct. 1240, 1243-1245, 10 L. Ed. 2d 349. In determining the sufficiency of objections we have applied the general principle that an objection which is ample and timely to bring the alleged federal error to the attention of the trial court and enable it to take appropriate corrective action is sufficient to serve legitimate state interests, and therefore sufficient to preserve the claim for review here."

We, therefore, say that on that principle of law the procedure used in the state Court in accepting and ruling on the counterclaim was so clearly violative of the federal statutes and so clearly resulted in depriving the national bank of its rights without due process of law that there was utter lack of judicial process.

The next phase of this Court's opinion seems to flow from a total misunderstanding of the record, either on our part or on the part of the Court. We refer to the bottom of page 5 and page 6 of the printed opinion, where this Court discusses the decrees and findings of the state Court. It is true that in the first opinion of the Circuit Court of June 26, 1958, termed "Partial Final Decree", the Court did enter joint judgments holding that the Coral Gables Bank, which was a national bank, was a co-adventurer and agents of each other with the state bank, the Pan American Bank. However, that theory was exploded by the opinion of the Appellate Court. The Appellate Court announced the correct interpretation of law that the penalties and remedies fixed under Title 12, § 86, were exclusive, but it completely failed to apply that doctrine, which we say was in contravention of a federal right. It is true that we applied for certiorari to the Supreme Court of Florida and also to the United States Supreme Court, neither of which was granted. Then this Court said in its present opinion (p. 7):

> "Thereafter, the court below made additional findings, modified its decree to conform with the mandate of the Court of Appeals and adjudged that the Banks were also barred from obtaining foreclosure of the mortgage made in connection with the transaction of March 20, 1957, because they were 'not in equity with clean hands.' No appeal was taken from the modified decree."

From that time on the Court seems to say that the matter was res judicata. This order on the first mandate is shown in the Transcript of Record at page 201, and is the order upon which execution was issued and the money paid to the trustee in the reorganization proceedings, but the controlling factor in that decree is set forth in para-

graphs III and IV, shown on pages 203 and 204, in which the Court said:

"III. That Constructors of Florida, Inc., is indebted to Coral Gables First National Bank and Pan American Bank of Miami in the amounts of Fourteen Thousand Three Hundred Twenty-Six Dollars and Seventy-Seven Cents ($14,326.77), and Ninety-Five Thousand Six Hundred Thirty-Six Dollars and Seventy-Seven Cents ($95,636.77), principal and interest included to May 1, 1958, respectively, on the loans of July 25, 1956 and July 24, 1956; but the mortgages allegedly securing said loans are not enforceable as said Banks are not in equity with clean hands. Said loans were not in default as of the commencement of this action. The Court does not determine whether or not said loans are now in default inasmuch as the United States District Court for the Southern District of Florida, in the proceedings for the reorganization of Constructors of Florida, Inc. has assumed jurisdiction of said claims.

IV. That Constructors of Florida, Inc. is indebted to Coral Gables First National Bank in the amount of Eleven Thousand Two Hundred Seventy-One Dollars and Twenty Cents ($11,271.20) on the loan of November 14, 1956; but the mortgages allegedly securing said loan are not enforceable as said Banks are not in equity with clean hands. Said loan was not in default as of the commencement of this action. The Court does not determine whether or not said loan is now in default inasmuch as the United States District Court for the Southern District of Florida, in the proceedings for the reorganization of Constructors of Florida, Inc., has assumed jurisdiction of said claims."

The federal Court, sitting as a reorganization Court under the provisions of Section 256, 11 U.S.C. 656, had taken over through its trustee all of the proceedings with reference to the liens against the actual personal property

under Section 257, 11 U.S.C. 657. The trustee became vested with all of the rights of the prior receiver in the involuntary bankruptcy and had physical possession of the chattels which were security for the debt. The state Court had never appointed any receiver or custodian, so that in the decree of April 14, 1961, as far as the personal property was concerned the state Court had been completely superseded and there could be no adjudication by the state Court with reference to those claims, or any part thereof, insofar as that affected the lien or the amounts due or the parties to whom they were due.

We think the Court is confused in its factual findings with reference to the procedure which was followed after April 11, 1961. Two procedures were followed—one in the federal Courts and one in the state Courts. In the federal Court an appeal was taken from the order of Judge Emett C. Choate refusing to take over and restrain the state Court litigation. That appeal resulted in the opinion of this Court, 299 F. 2d, page 736. This opinion was rendered on February 26, 1962. That date is important because at that time this Court, before any of the state Court procedure became final, in note 16, on page 740 of 299 Federal Reporter, 2nd Series, said:

> "As in note 15, supra, we likewise expressly disavow any purpose here to indicate any view on the extent to which, if any, the State Court judgment is to determine priorities, enforcement of security by the Banks, or other creditors, or the like. Although the Bankruptcy Court refused to enjoin execution on the State Court judgment, the funds received by the Receiver are now, and will remain, subject to the sole control and disposition of the Bankruptcy Court."

The other proceeding to the state Court was a direct appeal from the order and decree on the mandate of April 11, 1961, to which a motion to quash was filed, and the

District Court of Appeal of Florida, Third District, entered an order quashing the appeal (see 132 So. 2d 806). This order quashing the appeal was then covered by a petition for certiorari to the Supreme Court of Florida by final opinion of September 26, 1961, 133 So. 2d 319, case No. 3).

Within the time prescribed by law a second petition for certiorari was filed in the Supreme Court of the United States as a petition for writ of certiorari to the District Court of Appeal of Florida, Third Appellate District, and that petition was denied by the Supreme Court of the United States on March 5, 1962, or some seven or eight days after this Court had rendered its opinion on the appeal from Judge Choates' refusal to grant the injunction. Therefore, at the time this Court rendered its first opinion referring the matter back for further action and with the grant of powers in the opinion of February 26, 1962, the proceedings in the state Court and its various appellate processes had not been concluded. The money was in the hands of the trustee in the Chapter X proceedings and from that time on the United States District Court, Southern District of Florida, had taken sole control of all facets of the case. The printed record before this Court shows that beginning with May 2, 1962, or within several months after the mandate of this Court and the denial of the petition for certiorari from the state Court procedures, the trustee then instituted certain proceedings in the United States District Court (see Tr. 215 through 378). The trial procedure which we have above referred to and which this Court in its opinion clearly overlooked is also set forth in the printed Transcript of the Record, pages 376, 377 and 378.

We respectfully say that the second phase of this Court's opinion as shown on page 7, therefore, is clearly

erroneous, because the extensive appeals and appellate procedures through the Supreme Court of the United States were pending up until March 5, 1962. Those procedures were not further followed because, as aforesaid, the money was in the Registry of the United States District Court and the determination of the amounts, priorities, liens and the whole question of that distribution were in the custody of the federal court.

Whether the failure of this Court to recognize those procedures, or the correction of the opinion in that regard, would make any ultimate difference in this Court's conclusions is pure conjecture on our part, but we respectfully say that it should because it ties directly into the third phase of this Court's opinion, which was based upon the theory of either res judicata or estoppel by the approval of the plan in 1959. In that regard we respectfully say that this Court in its opinion overlooked certain basic matters with reference to the doctrine of res judicata and the doctrine of estoppel under the plan. We refer the Court to page 60 of the printed Transcript, wherein the Court entered a tentative order approving the plan of reorganization filed on November 21, 1958. This order was filed December 15, 1958 and, as shown on page 62 of the Transcript, that order was made without prejudice in any manner or form to prevent the trustee or any creditor, or the debtor, or the stockholders, from interposing such objections as they may deem advisable. On page 72 of the printed Transcript an order of January 15, 1959 is shown and reference to the so-called Bank litigation on the appeal pending in the District Court of Appeal of Florida, Third District, was excepted from the operation of said plan. On page 74, as shown by the order of January 9, 1959, the United States District Court in the reorganization proceedings took over all of the furniture, fixtures, equipment and

other physical chattels of the debtor and directed that they should be administered by the trustee under the provisions of the Bankruptcy Act and not according to any procedure in the state Court. The Court had the right to do this under the provisions of Sections 256, 257 and 258 of the National Bankruptcy Act, as above set forth. Objections to the claims of both the American Surety Company and the Coral Gables First National Bank, et al. were filed, and also objections to the plan had been filed.

On February 27, 1959 a joint stipulation and motion was entered into (Tr. 91) in which John Nicholas, as trustee, American Surety Company of New York, The Coral Gables First National Bank and Fitzgerald Engineering Company, Inc. stipulated that the reference on these plans and objections and claims which had been referred to L. Earl Curry, as Referee and Special Master, should be withheld, and this language was used:

> "but that it is not feasible to determine the validity or amount of said claims until the outcome of certain pending litigation, and that it is to the best interest of the estate that the attached order be entered."

That order was entered on February 27, 1959, as shown in the Transcript at pages 92 and 93, and in paragraph "6" of that order (see Tr. 94) the further determination by the federal Court of any of these matters affecting the disposition of the tangible properties held by the trustee and not by the state Court were reserved, and we quote:

> "until the final outcome of that certain litigation designated in the Plan of Reorganization heretofore filed herein as 'Bank Litigation'."

Based upon that stipulation and understanding The Coral Gables First National Bank consented to the modification of the plan of reorganization, but only with the specific

restrictions as to the time in which the federal Court would determine these problems. There were many matters involved in the state Court litigation with other parties who were not involved directly in the usury claims, but which might have had an indirect involvement in the carrying out of the plan. Nowhere in the record will this Court find any agreement by any of the parties that the federal Court would yield jurisdiction based solely and exclusively upon the determination made in the state Court. We respectfully say that in this respect this opinion is in error.

On March 11, 1959 the Court entered a special order confirming the plan of reorganization as modified, but all of the restrictions contained in the previous stipulations and orders were reserved. However, as shown in the Transcript at page 113, the United States District Court in the reorganization ordered the liquidation of all of the tangible assets upon which liens were claimed by The Coral Gables First National Bank. This point was further emphasized in the printed Record (see p. 122, ¶7). In the Transcript on page 129 there is shown the order confirming the sale, dated April 10, 1959, showing that the sale of all of the tangible assets had been handled solely by the trustee under the Chapter X reorganization proceedings, and after some intermediate proceedings following the first order of confirmation a new order was entered on May 6, 1959 (Tr. 170) confirming and reaffirming the sale by the trustee of all of the tangible property assets. That was the situation until May 23, 1961, or a period of approximately two years, at which time the trustee then filed a petition (see Tr. 172) to require The Coral Gables First National Bank to put the money represented by its credit bid of April, 1959 back into the Registry of the federal Court.

On June 28, 1961 (Tr. 207) the Court issued an order to show cause directed to The Coral Gables First National

Bank as to why the money should not be replaced with the trustee, and after appropriate proceedings an order was entered on July 27, 1961 (Tr. 209) in which the sum of $120,591.69 was decreed to be paid by The Coral Gables First National Bank, which was the $106,000.00 bid plus interest, but directing in paragraph "2" (see Tr. 210) that the said trustee, John Nicholas, was directed to deposit that sum in a special bank account separate from the accounts containing the trustee's other funds, and to make no disbursement from this said special bank account except upon further order of the Court. Paragraph "3" (Tr. 210) provided:

> "This order is made without prejudice to the further determination by this Court on the alleged legal issues raised in the answer of The Coral Gables First National Bank to the order to show cause, which legal issues are reserved for further determination by this Court upon further hearings upon notice."

No appeal was taken by anyone on this order. We respectfully say that all parties in this case knew that the federal Court—not the state Court—had taken over all of the tangible property and had taken unto its complete jurisdiction that phase of the litigation.

After the proceedings had been completed in this Court on the first appeal and after the Supreme Court of the United States had denied certiorari, then in accordance with the understanding of all of the parties a determination of the priority of the claims and the validity of the mortgage claims was undertaken by the reorganization Court. An order of reference was made February 27, 1963 (Tr. 224) referring the matter to J. B. Booher, the Referee, as Special Master. Then supplemental and additional objections to the claims of The Coral Gables First National Bank were filed by the trustee and extensive proceedings were then

taken before the Referee (see Tr. 228). Extensive briefs were filed by the trustee (Tr. 228 through 250) and the same type of memorandum was filed by the Banks, to-wit: The Coral Gables First National Bank on its own behalf and as trustee for Pan American Bank of Miami, shown beginning at page 250 of the Transcript. Extensive exhibits were attached, and this matter was tried for the first time in the federal Court in the reorganization proceedings. This answer, memorandum and exhibits are shown in the Transcript at pages 350 through 378. Before these proceedings could be completed, on May 23, 1963, The Coral Gables First National Bank filed its motion (Tr. 379 through 390), in which it was pointed out (see Tr. 384) that pending these hearings in the District Court in the reorganization proceedings the Supreme Court of the United States had rendered three pertinent and controlling opinions —*Southern Construction Company, Inc.* v. *Petitioner et al.*, 83 S. Ct. 108, which we contended exploded the doctrine of the Alley case and the right of determination of usury claims by cross bill in an equity action on the foreclosure of the mortgage in the state Court. We then pointed out (see Tr. 385) that the United States Supreme Court in the case of *Mercantile National Bank at Dallas* v. *Langdeau* and *Republic National Bank of Dallas* v. *Langdeau*, 83 S. Ct. 521, in a combined opinion involving the provisions of United States Statute 5198, Title 12, U.S.C.A., §§ 85 through 94, in which the Supreme Court had reiterated, reconfirmed or reestablished the fact that the specific provisions of Statute 5198, with references to usury claims against a national bank were exclusive and that no Court, whether it be a state Court or a federal Court, had any power or jurisdiction to proceed otherwise. We point out (see Tr. 387) that the Supreme Court of the United States in an opinion dated March 25, 1963, *Michigan National Bank* v. *Robinson*, 83 S. Ct. 914, had also made a similar ruling in some usury matters involving a national bank of Mich-

igan which had done business in Nebraska. The Nebraska Courts had used their own state procedure and rules for the determination of usury claims against the Michigan bank. The Supreme Court, however, held in accordance with the previous cases just mentioned, that they were in error in doing so and that the provisions of Statute 5198 were exclusive. It was based upon these two concepts—first, that the reorganization Court had at all times from the date of the reorganization in the fall of 1958 assumed exclusive control over the intangible assets, and, second, that the procedure followed by the state Courts of Florida were in violation of the restrictive provisions of the federal statutes with reference to the usury and penalty claims. Judge Emett C. Choate in his order of December 20, 1963 made a complete analysis of these cases and the background and held that The Coral Gables First National Bank claim on the first mortgages of July, 1956, being no way involved in the usury procedure or usury penalties, could not be defeated by any collateral orders of a state Court and to that extent he granted relief to The Coral Gables First National Bank. We respectfully say that there was no error in that proceeding in that regard and that this Court's determination in the third phase of the order that that point was res judicata or that it was estopped by the plan has no legal basis when this entire record is considered.

With reference to the second phase of the usury charge Judge Choate ordered that he felt that he was precluded not by any state Court procedure, but by some language in the first opinion of this Court, 299 F. 2d 736. This Court apparently in its opinion did not pass upon that point, but based its conclusion in the third phase of the case for reversal of Judge Choate upon other grounds, which we respectfully say are not tenable.

Our position is supported by a recent decision of the Courts of New York in the case of *Sulil Realty Corp., plaintiff,* v. *Rye Motors, Inc., defendant,* Westchester

County Court, January 19, 1965, case reported in 257 N.Y.S. 111. This case involved an attempt by a New York Court to punish by contempt a Connecticut national bank for failing to comply with certain orders of the New York Court. The Court discussed the provisions of Title 12, U.S.C.A., § 94, which is one of the sections in U.S. Statute 5198, and held that these requirements of the statute affecting claims against national banks were mandatory in the absence of a consent or a waiver, quoting as authority for that statement *Mercantile National Bank at Dallas* v. *Langdeau,* 371 U. S. 555, 561, 83 S. Ct. 520, 523, 9 L. Ed. 2d 523, which is one of the cases we have relied upon. In paragraph 7 of the opinion of that Court (text p. 115 of the reported case) that Court said:

> "In our opinion, the immunity to suit in a foreign state granted to a national banking association by the National Banking Act (12 U.S.C.A. § 94, supra), in the absence of a waiver thereof or consent to submit to such foreign court's jurisdiction, is pre-eminent over the jurisdiction and venue provisions of the State of New York as embodied in the provisions of Article 3 and Article 52, of the CPLR. As was said in (Crofoot v. Giannini, 196 Misc. 213, 92 N.Y.S. 2d 191), since a national banking association is a creature of federal, rather than state law, the question of where it can be sued is governed by federal laws."

We say that the same doctrine applies in this case and that no Court, state or federal, could have proceeded with any determination of usury. This money is in the federal Court and should be disbursed only in accordance with the federal doctrines.

We realize that the issues in this case may be such that a certiorari would be taken to the Supreme Court of the United States for its ultimate decision, regardless of who is the successful party. The question as to whether the Alley case by the Tenth Circuit in 1942 was a valid and

proper decision, or as to the question as to where the later cases of the Supreme Court of the United States above mentioned overrule that doctrine nunc pro tunc are matters of serious federal constitutional and statutory constructions.

We do respectfully urge, however, that the state of the record as disclosed by the present opinion is not an accurate or even a fair representation of the factual matters as disclosed in the record, and that we are entitled to have this Court pass squarely upon these questions so that the issue, if and when presented to the Supreme Court of the United States, will be squarely determined one way or the other. We, therefore, say that in the interest of clarity and in the interest of justice, a rehearing should be granted and, if the Court feels it necessary, that reargument be permitted.

Respectfully submitted,

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By .....
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By .....
WILLIAM B. ROMAN
Attorneys for Pan American Bank of Miami

I HEREBY CERTIFY that the above and foregoing petition for rehearing is filed in good faith and not for the purposes of any delay.

.....

W. G. WARD

I HEREBY CERTIFY that a copy of the foregoing Petition for Rehearing was this ..... day of July, 1965, mailed to Blackwell, Walker & Gray, First Federal Building, Miami, Florida, and Tom Maxey, 3001 Ponce de Leon Boulevard, Coral Gables, Florida, attorneys for American Surety Company of New York, and John H. Gunn, 1534 duPont Building, Miami, Florida, attorney for John Nicholas, Trustee.

.....

W. G. WARD.

APPENDIX D

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 21448

IN THE MATTER OF CONSTRUCTORS OF FLORIDA, INC., Debtor in Reorganization.

AMERICAN SURETY COMPANY OF NEW YORK,
Appellant,

versus

THE CORAL GABLES FIRST NATIONAL BANK and JOHN NICHOLAS, Trustee,
Appellees.

IN THE MATTER OF CONSTRUCTORS OF FLORIDA, INC., Debtor in Reorganization.

THE CORAL GABLES FIRST NATIONAL BANK,
Appellant,

versus

AMERICAN SURETY COMPANY OF NEW YORK and JOHN NICHOLAS, Trustee,
Appellees.

Appeals from the United States District Court for the Southern District of Florida

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(Filed Sept. 3, 1965)

On Petition for Rehearing

Before TUTTLE, Chief Judge, PHILLIPS* and WISDOM, Circuit Judges.

PER CURIAM:

It is ORDERED that the petition for rehearing filed in the above styled and numbered cause be, and the same is, hereby DENIED.

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*Of the Tenth Circuit, sitting by designation.

APPENDIX E

Appendix 1.

Memorandum Opinion on Trustee's Objections to Claim of Coral Gables First National Bank and on Bank's Motion for Order to Pay Funds.

Filed Dec. 20, 1963.

(Title Omitted.)

Statement of Case.

This matter is before the Court on Objections of John Nicholas, Trustee, and Supplemental and Additional Objections of the Trustee to the Claim of the Coral Gables First National Bank filed in these corporate reorganization proceedings, and on the Motion of the Bank for Order Directing Trustee to Pay Funds, and upon the Trustee's response thereto.

The Pleading Pertaining to the Bank's Claim and Objections thereto:

On January 5, 1959, the Bank filed its secured claim in the amount of Two Hundred Eighty-two Thousand, Five Hundred Forty-eight and 83/100 ($282,548.83) Dollars, based on certain mortgages which had been the subject of extensive State Court litigation.[1]

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1. The Proof of Claim states in part: "$282,548.83, which includes interest due to May 1, 1958, plus interest from said date, plus attorney's fees. See case No. 205,613-E, Circuit Court of Dade County, Florida—Chancery. . . .

(5) That the consideration of said debt is for monies loaned on security. (See in detail all proceedings, Circuit Court of Dade Co., Florida, Chancery No. 205,613-E in reference to matters on appeal, District Court of Appeal, Third District, No. 58-526, said proceedings being referred to in the Petition and previous Orders of this Court entered herein, full reference to the same made a part hereof. [See 119, So.2d 741 (Fla. App. 1960) which was the original appellate opinion on 58-526].

On January 27, 1959, the Trustee filed Objections to this Claim. These objections were:

(a) "That the Debtor is not indebted to the Creditor in the amount stated.

(b) That the Proof of Claim is improperly and inaccurately prepared in that it declares a priority of a secured creditor for the creditor when the creditor is unsecured in a lesser amount than shown by the Proof of Claim.

(c) That the Creditor has charged the Debtor a usurious rate of interest and therefore is precluded from enforcing its claim."

Subsequently, by order entered in the Court on February 27, 1959, upon the stipulation of all the interested parties, the Bank's claim was allowed as a secured claim in the amount of $156,728.75 and an unsecured claim in the amount of $125,820.08. However, such allowance was "for the purpose of voting upon the acceptance or rejection of the Plan of Reorganization in the proceedings," and such allowance was "without prejudice to the right of any interested party with respect to the distribution of the proceeds of this estate to later object to the classification, priority of amount" of said claim. The final determination of the Bank's claim was reserved until final decision in

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(5b) That notes have been received—See litigation files above mentioned. . . .

7. That there are no setoffs or counter-claims to the same (except see litigation files above mentioned).

(8) That said creditor has not, nor has any person by order of said creditor, or to the knowledge or belief of said deponent for the use of said creditor, received any manner of security for said debt whatever (except for the following which are the only securities held by creditor for said debt. . . . The securities are those referred to in Chancery Case 205,613-E and participation certificate issued by Claimant herein to Pan American Bank of Miami as per showing in litigated case above referred to."

the State Court litigation designated in the Plan of Reorganization as "Bank Litigation" which is discussed at length below.

After the State Court litigation had been completed, the Trustee, pursuant to the terms and provisions of the Order of February 27, 1959, filed additional objections to the claim of the Coral Gables First National Bank which raised the following points.

1. It has been finally determined in Chancery Proceedings 205,603-E (the Bank Litigation) that the various liens, claimed by the Coral Gables First National Bank and allegedly participated in by the Pan American Bank of Miami are unenforceable and that, therefore, the entire bank claim is unsecured.

2. It has been finally determined in the bank proceedings that the claim of the Coral Gables First National Bank is in the proper amount of $121,234.74, all of which is unsecured.

3. The Coral Gables First National Bank cannot participate in the proceeds effected by the recovery of the Trustee from the Coral Gables First National Bank and the Pan American Bank of Miami by way of usury penalties; nor, at this time, in the funds realized from the sale of assets.

The Pleadings Pertaining to the Banks' Motion for Order Directing the Trustee to Pay Funds:

On May 23, 1963, the Banks filed their Motion for an Order Directing the Trustee to Pay Funds. This was a motion seeking the repayment to the Banks of the monies paid by the Banks to the Trustee pursuant to the Circuit Court judgment.

A Response to the Trustee to said Motion was filed May 31, 1963. The Banks' motion was in essence a collateral attack on the jurisdiction of the State Court to entertain the counterclaims against the banks which led to the judgment against them. The effect of this attack will be discussed in detail below.

History of the "Bank Litigation":

The history of these reorganization proceedings and of the "Bank Litigation," is clearly and concisely set forth in the Opinion of the Circuit Court of Appeals, Fifth Circuit, reported at 299 F.2d 736. As that opinion noted, the State Court litigation began when the Claimant, The Coral Gables First National Bank, together with the Pan American Bank of Miami instituted an action seeking to foreclose three chattel mortgages. This action, filed in the Circuit Court in and for Dade County, Florida, prior to the onset of any Federal Bankruptcy proceedings, named Constructors of Florida, Inc., the Debtor in these proceedings, as defendant. The first two of these mortgages involved amounts due of $13,888.95 and $92,690.85. These are designated the July mortgages referring to the month in 1956 when they were executed. The third mortgage, having an alleged balance of $151,802.46, is referred to as the November mortgage as it was executed November 14, 1956. All of these mortgages had been given to the Banks by Constructors to secure certain loans. Various counterclaims were asserted by Constructors and the other Defendants in said action to recover usury and related penalties from the Banks. Thereafter, an involuntary Petition in Bankruptcy was filed against Constructors, and, subsequently, a Petition for Corporate Reorganization filed in the Bankruptcy was approved. A Trustee was appointed, and a Plan of Reorganization was proposed and confirmed. The Receiver in Bankruptcy, and thereafter the Trustee in

Corporate Reorganization, were substituted for Constructors in the State Court action. Provision was made in the Plan of Reorganization (which was accepted by the Banks) for the continuation of the "Bank Litigation" in the Florida State Courts.

After a trial of the issues by the State Court, a Partial Final Decree was entered which, among other things, found the November 14, 1946 loan and mortgage transaction usurious under Florida law. A substantial judgment in favor of the Trustee against said Banks on the usury counterclaims was entered. The judgment determined the July mortgages to be valid indebtedness due the banks by the debtor. However, the Chancery Court denied the Banks' prayers for foreclosure of the July mortgages on the ground that these mortgages, and notes secured thereby, were not in default and not subject to foreclosure in that action. The State Court further held the liens of the July mortgages unenforceable as the Banks were not in equity with clean hands. Apparently on this basis the State Court held that liens of the City of West Palm Beach and of American Surety Company of New York against the chattels and equipment encumbered by said mortgages were superior to any claims of the Banks asserted in said action.

An appeal was taken by the Banks to the District Court of Appeal of Florida, Third District, which Court by its opinion reported at 119 So.2d 741 (1960) modified said Partial Final Decree in certain respects, not pertinent here, but affirmed the denial of foreclosure of the two July mortgages. Thereafter Petitions of the Banks for Writ of Certiorari were denied by the Supreme Court of Florida as reported at 123 So.2d 349 (1960) and by the Supreme Court of the United States, 365 U.S. 811 (1961).

Upon denial of further appeal, the State Trial Court entered its Order and Judgment on the Mandate[2] which

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2. The Order read in part:

"I. That John Nicholas, as Trustee for Constructors of Florida, Inc., on his counterclaim, have and take from the Plaintiff, The Coral Gables First National Bank, the principal sum of Seventy-Four Thousand Eight Hundred Sixty-Seven and 52/100th ($74,867.52) Dollars, with interest as provided by law from July 2, 1958, for which sums let execution immediately issue."

"II. That John Nicholas, as Trustee for Constructors of Florida, Inc. on his counterclaim, have and take from the Plaintiff, Pan American Bank of Miami, the principal sum of Two Hundred Sixty-Five Thousand Nine Hundred Ninety-nine and 27/100ths ($265,999.27) Dollars, with interest as provided by law from July 2, 1958, for which sums let execution immediately issue."

"III. That Constructors of Florida, Inc., is indebted to The Coral Gables First National Bank and Pan American Bank of Miami in the amounts of Fourteen Thousand Three Hundred Twenty-Six and 77/100ths ($14,326.77) Dollars, and Ninety-Five Thousand Six Hundred Thirty-Six and 77/100ths ($95,636.77) Dollars, principal and interest included to May 1, 1958, respectively on the loans of July 25, 1956 and July 24, 1956; but the mortgages allegedly securing said loans are not enforceable as said Banks are not in equity with clean hands. Said loans were not in default as of the commencement of this action. The Court does not determine whether or not said loans are now in default inasmuch as the United States District Court for the Southern District of Florida, in the proceedings for the reorganization of Constructors of Florida, Inc., has assumed jurisdiction of said claims."

"IV. That Constructors of Florida, Inc., is indebted to The Coral Gables First National Bank in the amount of Eleven Thousand Two Hundred seventy-one and 20/100ths ($11,271.20) Dollars, on the loan of November 14, 1956; but the mortgages allegedly securing said loan are not enforceable as said Banks are not in equity with clean hands. Said loan was not in default as of the commencement of this action. The Court does not determine whether or not said loan is now in default inasmuch as the United States District Court for the Southern District of Florida, in the proceedings for the reorganization of Constructors of Florida, Inc., has assumed jurisdiction of said claim."

"IX. That the lien of American Surety Company of New York on the chattels and equipment of Constructors of Florida, Inc. on account of the Chattel Mortgage sought to be foreclosed herein, in the principal amount of One Million Three Hundred Sixty-Seven Thousand Three Hundred Seventy-

the Banks futilely sought to have reviewed in the State Appellate Courts[3] as well as the United States Supreme Court.[4]

The Trustee issued execution upon and collected the usury money judgment from the banks pursuant to this Order and Judgment on the Mandate. Further, the Trustee received payment from the Coral Gables First National Bank, pursuant to Order of this Court, dated July 27, 1961, for the amount bid by the Bank at the sale of personal property of the Debtor held by the Trustee on March 23, 1959.

In the meantime, prior to the entry of the State Court Order and Judgment on the Mandate, the Banks moved this Court for Injunction, Stay Order and Directions to the Trustee and his Counsel. By this motion the Banks sought to have this Court take jurisdiction of the matter pending in said State Court action and enjoin any further proceedings in the State Court. The motion was denied and the Order of Denial was affirmed by the United States Circuit Court of Appeals, Fifth Circuit, by its Decision dated February 26, 1962, reported at 299 F.2d 736.

Opinion.

In the outset, we should dispose of the Banks' contention that the entire State Court Judgment against them is void for lack of jurisdiction. The Banks' position

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Nine and 19/100ths ($1,367,379.19) Dollars and interest thereon, plus attorneys fees in the amount of Seventy-Two Thousand Three Hundred Forty-Seven and 58/100ths ($72,347.58) Dollars, is superior to any claim of Banks asserted herein; but the Court reserves decision as to the various claims and counterclaims asserted between the Trustee and the American Surety Company of New York, pending the outcome of the second phase of this action."

3. See 132 So.2d 806 (1961) and 133 So.2d 319 (1961).

4. See 369 U.S. 810 (1962).

is grounded upon the interpretation of Section 5198, Revised Statutes, 12 U.S.C. §86 found in McCollum v. Hamilton Nat. Bank, 303 U.S. 245 (1938), and cases cited therein, to the effect that a suit for usury against a national bank can only be enforced in a separate action brought for that purpose and cannot be recovered by way of set-off in a suit brought on the note held by the bank.

The record discloses that the banks have consistently maintained the lack of State Court jurisdiction throughout the prolix proceedings in both State and Federal Courts. The State Court rejected this argument of the Banks on the basis of John R. Alley & Co. v. Federal National Bank of Shawnee, Okla., 124 F.2d 995 (10th Cir. 1942) which held that the McCollum case, since it was decided prior to the adoption of the Federal Rules of Civil Procedure (28 U.S.C.A.), did not prevent the assertion of the compulsory counterclaim for usury, pursuant to Federal Rule 13, in an action initiated by a national bank on a note.

The Banks now claim that subsequent to the last appellate decision in this case the United States Supreme Court has made it clear that the rationale of the Alley case was erroneous. In Southern Construction Co. v. Pickard Engineering, 371 U.S. 57 (1962), the Court held that where "fragmentation" of claims, which might otherwise be subject to Rule 13(a) of the Federal Rules of Civil Procedure, was required by federal statute,[5] the Rules of Civil Procedure did not require the filing of the counterclaim in contravention of the statute. In Mercantile Nat'l Bank v. Langdeau, 371 U.S. 555 (1963) and in Michigan Nat'l Bank v. Robertson, 372 U.S. 591 (1963) the Court reaffirmed the earlier cases that Section 5198 R.S. fully

5. In the Southern Construction Co. case the statute in question was the Miller Act, 49 Stat. 793, 40 U.S.C., §§270a-270d (1935).

preempted state statutes with regard to usury action against national banks.[6]

The Banks argue that the vitality of the McCollum case is fully restored by these late decisions of our high Court, and the State Court's jurisdiction over the counterclaims was non-existent. The Banks ask that the State Court's allegedly void judgment be set aside on this collateral attack. The result would be that the entire proceeds of the judgment now in the hands of the Trustee should be returned to the Banks.

If this was an argument presented at the onset of litigation, it would raise a question of substance as respects the propriety of State Court jurisdiction over the counterclaims. Reconciliation of the McCollum and John R. Alley & Co. dichotomy in view of the late high Court decisions is one which will necessarily trouble the first Court which is faced with the problem. However, this Court need not enter into such troubled precincts. Counsel for the banks admits that he has raised the question of jurisdiction at every point in these proceedings. The Trustee specifically cites us to page 20 of the Bank's brief before the 5th Circuit where the question was raised in that appeal. The Court of Appeals rejected the argument. Further, Section 5198 R.S., 12 U.S.C. §94 confers jurisdiction and venue on State Courts in the county where the national bank is located. The language of Chicot County Dist. v. Bank, 308 U.S. 371, 377 (1940), appears applicable.

> "The Court (purporting to act under a statute of Congress) has the authority to pass upon its own jurisdiction and its decree sustaining jurisdiction

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6. Both the Langdeau and Robertson cases involved venue questions, and both, in their dicta, recognized that the venue privilege could be waived.

against attack, while open to direct review, is res judicata in a collateral action."[7]

And as the Court of Appeals said in this case:

> ".... if the Florida Court had the power to continue that litigation, then that power included the power to err." 299 F.2d at 739.

The substantive penalties for usury are not attacked directly herein, and as the Banks are barred by res judicata on a determination of the State Court's jurisdiction, the Banks' Motion for Order Directing Trustee to Pay Funds must be denied as to the usurious mortgage and penalties.

In this context, therefore, only one question remains to be disposed of on this hearing. That is: Is this Court bound by the decision of the State Courts of Florida that the liens of the two July 1956 mortgages are unenforceable because the mortgagee, praying foreclosure, joined them in a foreclosure action with a third mortgage determined to be usurious under Florida law?

In his original partial final decree the State Court Chancellor said:

> "The lien of the mortgages securing said debts are unenforceable as the Banks are not in equity with clean hands. The lien of the City of West Palm Beach and American Surety Company of New York against such chattels and equipment of the Corporation are superior to any claims of the Banks asserted in this proceeding."

This determination was carried over into the Judgment on Mandate, note 2, supra.

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7. This principle has been reiterated in unmistakable terms in Mr. Justice Stewart's, opinion in Durtee v. Duke, ____ U.S. ____ (1963), 32 U.S.L. Week 4014 (Dec. 2, 1963).

There are two compelling reasons why this Court cannot regard itself bound in this bankruptcy proceeding by the above cited portion of the State Court decision. The State Court recognized that the debt secured by these chattel mortgages (not bearing the taint of usury) was a valid one.

It appears to be established law in Florida that the refusal of an equity Court to lend its aid to an actor charged with having come into the Court with unclean hands is not res judicata to defeat a subsequent action at law and does not destroy the substantive right sought to be enforced. Hauer v. Thum, 67 So.2d 643, 645 (Fla. 1953); Mabson v. Mabson, 140 So. 801, 805 (Fla. 1932). See also Busch v. Baher, 83 So. 704 (Fla. 1920), and c.f., Wilson v. Rooney, 101 So.2d 892 (Fla. App. 1958).

In other jurisdictions where the question has been raised similar holding are found. Thus, the Tenth Circuit Court of Appeals in a Colorado case, Buchhalter v. Rude, 54 F.2d 834 (1931) said:

> "The doctrine of unclean hands is a weapon of defense—it is not a muniment of title."

The Court went on to say that the doctrine could not be used to pass title, which would be the effect of the State Court decision if given the effect of res judicata by this Court.

Further, we find that the law of the case and the right and duty of this Court to protect its jurisdiction under the Bankruptcy Act precludes giving any effect to the "unclean hands" portion of the State Court judgment.

In February, 1959, this Court entered an Order authorizing the Trustee to continue the State Court litiga-

tion but reserved final disposition of the results of that litigation. This procedure was upheld by the Circuit Court of Appeals, and in Judge Brown's able decision it was specifically pointed out:

> "We . . . expressly disavow any purpose here to indicate any view on the extent to which, if any, the state Court judgment is to determine priorities, enforcement of security by the Banks, or other creditors, or the like. Although the Bankruptcy Court refused to enjoin execution on the State Court judgment, the funds received by the Receiver are now, and will remain, subject to the sole control and disposition of the Bankruptcy Court." 299 F.2d at 740, n. 16.

Such control and disposition is necessarily required by the National Bankruptcy Act. See the detailed discussion in First National Bank of Houston, Texas v. Lake, 199 F.2d 524 (4th Cir. 1952), cert. denied, 344 U.S. 914 (1953).

The ultimate disposition of assets, within the jurisdiction of this Court and in the possession of the Trustee, is vested in this Court. The prior proceedings in this cause whether State or Federal do not require that this Court abrogate its duty to determine the ultimate validity and priority of claims against the estate. This Court is empowered to provide a forum for the substantive determination and enforcement of such liens.

On the record before us, it appears that as a matter of adjective law the State Court refused the aid of its equity power to enforce a property interest otherwise found valid. As an apparent concomitant of such refusal, the State Court further undertook to advance in dignity what is claimed by the bank to be a junior lien. Since on the face of its original decree, the priority afforded the surety lien by the State Court appears to be

based on the "clean hands" ruling;[8] it is the opinion of this Court that for this and the foregoing reasons that the question of validity and priority of those bank mortgages unaffected by usury should and shall be determined by this Court.

The Court finds that the estate is indebted to the Banks in the amounts of $14,326.77 and $95,636.77, principal and interest included to May 1, 1958, on the July, 1956 loans. The estate is further indebted to the Banks in the amount of $11,271.20 on the loan of November 14, 1956, which the State attributed to the National Bank and hence non-forfeitable.[9]

This indebtedness was secured by mortgage liens against the debtor's personal property, and the loans are now past due and in default. The liens of said mortgages should be transferred to the sum of $120,591.69 in the possession of the Trustee which amount represents that paid by the Banks for the purchase of the property encumbered by the liens, and the excess of the estate's indebtedness shall be considered an unsecured claim, but one which cannot participate in the proceeds of the usury penalty. Further relief on the petition of the Banks must be denied, and the estate declared not further indebted to the Banks than as above stated.

The American Surety Company of New York also had a lien totaling $1,439,726.77 on the same chattels encumbered by the said mortgages held by the Banks, and that

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8. If there were reasons other than the refusal of the Court to exercise its power because of its determination as to the bank's unclean hands, it has not been brought to the attention of this Court. Any substantive basis supporting the respective claims to priority may, of course, be raised in further proceedings before this Court as ordered below.

9. The $11,271.20 is the 7% furnished by the National bank. See 119 So.2d 747-48 (1960) for full discussion of this item.

lien should also be transferred to the fund representing the proceeds of the sale of said property.

Order will be entered in accordance herewith.

Entered at Miami, Dade County, Florida, this the 18 day of December, 1963

EMETT C. CHOATE,
United States District Judge.

Order on Trustee's Objections to Claim of Coral Gables First National Bank and on Bank's Motion for Order to Pay Funds.

Filed December 20, 1963.

(Title Omitted.)

The Court having this date entered its Memorandum Opinion in this cause; in accordance therewith, it is,

Ordered, Adjudged and Decreed as follows:

1. That the Motion of the Coral Gables First National Bank and Pan American Bank of Miami for Order Directing Trustee to Pay Funds be and the same is hereby denied.

2. That the Coral Gables First National Bank and the American Surety Company of New York be and they are hereby determined to have valid liens against the sum of $120,591.69 held by the Trustee, John Nicholas, representing the proceeds of sale of certain personalty of the Debtor encumbered by said liens. Such determination is without prejudice to the determination of the relative priorities of said claimants' liens.

3. That the matter of the priorities of the said liens of the said Coral Gables First National Bank in the amount of $121,234.74, and of the American Surety Company of New York in the amount of $1,439,726.77 be and they are

hereby referred to J. B. Booher, Referee in Bankruptcy, as Special Master, to hear the evidence and considered the law thereon, and to report to this Court his findings of fact, conclusions of law and recommendations thereon as to the relative priorities of the said liens of Coral Gables First National Bank and of American Surety Company of New York against the proceeds of the sale of the property encumbered by said liens, to-wit: the amount of $120,591.69. Such determination shall be without prejudice to the Trustee's counterclaims asserted against the said American Surety Company of New York in the hereinabove described State Court proceedings and without prejudice to the Trustee's objections to the claim of the American Surety Company of New York filed in this proceeding.

4. That the Coral Gables First National Bank be and it is hereby awarded a secured claim in the amount of $121,234.74 against the hereinabove described fund representing the proceeds of the sale of the personalty and as to any deficiency thereof, upon distribution of said proceeds, the Coral Gables First National Bank be and it is hereby awarded an unsecured claim to participate ratably with other unsecured claims in such proceeds as may be available for unsecured claims. However, the Coral Gables First National Bank shall not share in any sums collected by the estate as usury penalties from the "banks."

5. That the Trustee's objections to the claim of the Coral Gables First National Bank be and they are hereby overruled in respect to the objections to the claim of said Bank as a secured claim against the proceeds of sale of the hereinabove described personalty. Except as herein stated the objections of the Trustee to said claim are sustained.

6. In view of the protracted history of this case to date, the Court requests the Special Master to afford this reference the earliest possible hearing and disposition.

Counsel for the parties and the Special Master are further instructed that the Court regards this opinion and order as presently dispositive of the effect of the State Court decree as res judicata on issues presently before this Court as respects the non-usurious mortgages and its effect need not be further considered on this reference.

Done and Ordered at Miami, Florida, in said District, this 18 day of December, 1963.

EMETT C. CHOATE,
United States District Judge.

Office-Supreme Court, U.S.
FILED
DEC 2 8 1965
JOHN F. DAVIS, CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1965

No. 777

IN THE MATTER OF CONSTRUCTORS OF FLORIDA, INC., Debtor in Reorganization

THE CORAL GABLES FIRST NATIONAL BANK and PAN AMERICAN BANK OF MIAMI,
Petitioners,

vs.

AMERICAN SURETY COMPANY OF NEW YORK, and JOHN NICHOLAS, as Trustee,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS, FIFTH CIRCUIT

BRIEF OF JOHN NICHOLAS, AS TRUSTEE OF CONSTRUCTORS OF FLORIDA, INC., RESPONDENT, IN OPPOSITION.

JOHN H. GUNN
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JOHN NICHOLAS,
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Miami, Florida 33131

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OPINIONS BELOW

In addition to the opinion Petitioners seek to have reviewed (Petition App. "A") there are other relevant opinions by the Florida and Federal Appellate Courts in this cause; that of the United States Court of Appeals, Fifth Circuit, dated February 26, 1962, reported at 299 F(2d) 736, that of the District Court of Appeal of Florida, dated March 22, 1960, in related State Court proceedings,

reported at 119 So.(2d) 741 and a copy of which is set forth in the Record at R. 350-368. The Judgment of the Florida Circuit Court on the Mandate of the Florida District Court of Appeal, dated April 14, 1961 in the related State Court proceedings is not officially reported, but a copy appears at R. 371-376.

QUESTION PRESENTED

Should this Court grant a Petition for a Writ of Certiorari from a Judgment and Opinion of the United States Court of Appeals where:

(1) The determination of the Court below was that a final judgment of the State Court of Florida in proceedings instituted in that Court by the Petitioners was res adjudicata, and precluded the Petitioners from relitigating, in the Bankruptcy Court, the issues resolved and concluded by the State Court, including the issue as to the jurisdiction of the State Court to entertain and award recovery on a counterclaim against the National Bank which was held to be a joint venturer with a State Bank, based on usurious interest collected by the National Bank, the Petitioners admitting that they contested the jurisdiction of the State Court throughout every stage of the State Court proceedings, in the Florida Appellate Courts, and by two Petitions for Writ of Certiorari to this Court, both of which were denied, and where Petitioners approved and consented to the confirmation of a Plan of Reorganization which provided for the continuation in the State Court of the State Court litigation; and

(2) The Petition fails to show, as required by Rule 19 of the Rules of this Court, that there are special and important reasons for the granting by this Court of the review sought?

STATEMENT OF THE CASE

In January, 1957, Petitioners, a National Bank and a Florida State Bank which participated to the extent of ninety-three percent (93%) in the loan, sued, as co-plaintiffs, in a Florida State Court to foreclose three mortgages encumbering substantially the same personalty. This respondent is the Trustee in Corporate Reorganization subsequently appointed for the mortgagor-defendant (R. 70-74).

The mortgagor, and its Surety, counterclaimed against both Banks, alleging violation of the Florida Usury laws (R. 352-353). The National Bank contested the jurisdiction of the State Court to entertain the counterclaim, as against it. (Petition, 6)

In June, 1958, the State Court, on the counterclaims, found that the loan arrangement was a contrivance of the State Bank to employ the participation device to use the National Bank as a conduit, to make a usurious loan immune from the penalties of Florida law by the National Banking Act, and the "Banks were joint adventurers and agent and principal each for the other," and had charged interest usurious under Florida law as to one mortgage loan. The State Court imposed penalties prescribed by Florida law against the State Bank, the penalty prescribed by Federal law against the National Bank (the State Court Chancellor's first decision was corrected by the Florida appellate court in this regard) and held the other two mortgages unenforceable as the Banks were not in equity with clean hands. (Chancellor's decision R. 330-349, Florida Appellate Court decision R. 350-368).